

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 136

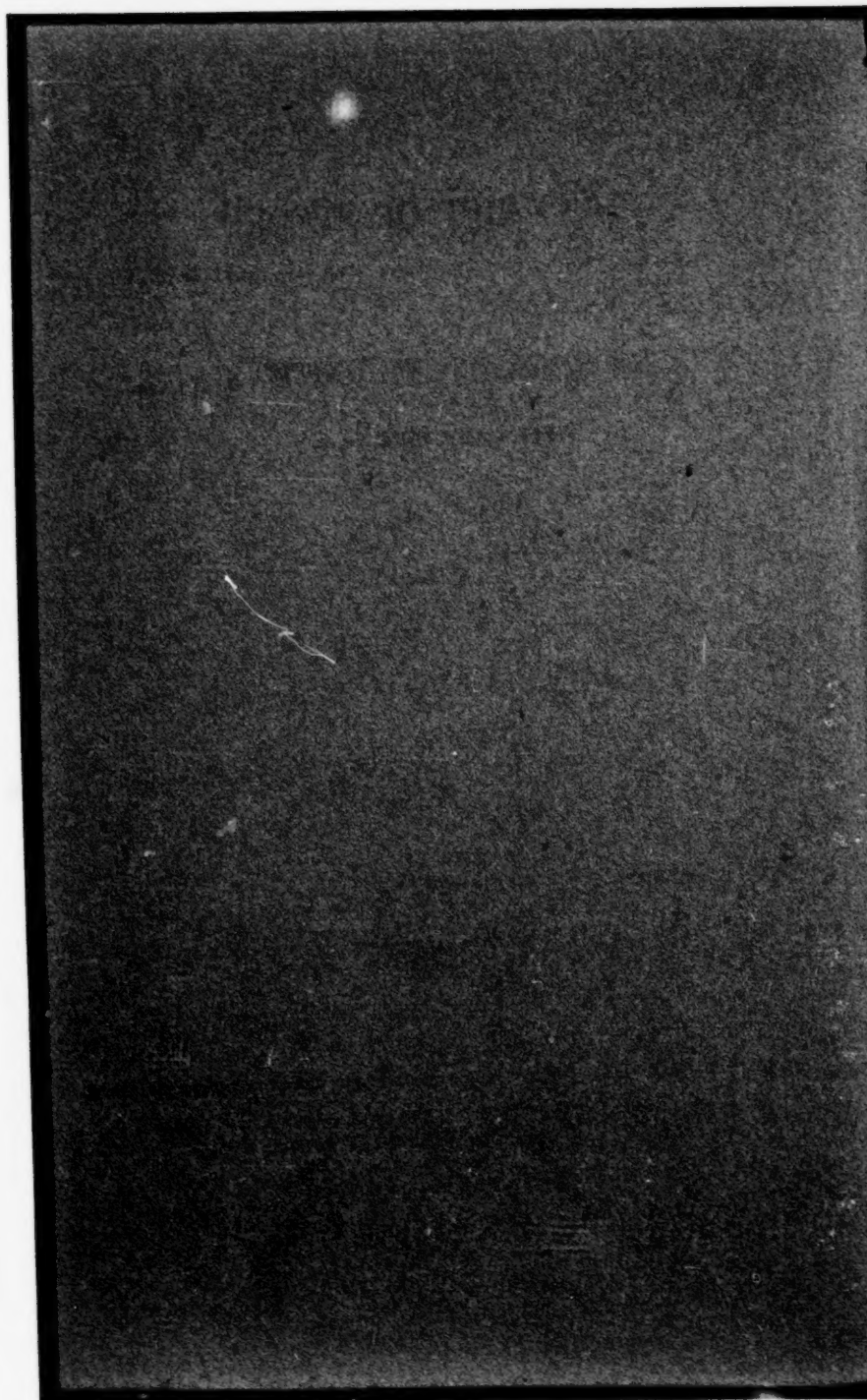
THE FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI, PETITIONER.

WERT ADAMS, REVENUE AGENT OF THE STATE OF
MISSISSIPPI.

AN WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI.

RECORDED AND INDEXED FROM SEPTEMBER 1, 1931
TO SEPTEMBER 30, 1931

(17-136)



(27,898)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 541.

THE FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI, PETITIONER,

vs.

WIRT ADAMS, REVENUE AGENT OF THE STATE OF
MISSISSIPPI.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSISSIPPI.

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1 Caption to March Term, 1919.

THE STATE OF MISSISSIPPI,
Harrison County:

Be it remembered, That at a regular Term of the Circuit Court of Harrison County, Mississippi, *was* begun and held on the Fourth Monday of March A. D., 1919, being the 24th day of March A. D., 1919, at and in the court-house of said County and State, in the City of Gulfport, in said County and State, the same being the time and place designated by law for holding said Court.

There were present and in attendance on said Court, the Hon. Charles L. Rushing, Judge of the Second Judicial *Circuit* District Court of the State of Mississippi, herein solely presiding, J. B. Clark sheriff of said County and State, A. J. Ramsay, Jr., Clerk of said Court and Robert L. Murphy, Official Court Stenographer of said Circuit Court District.

Agreement as to What Transcript Shall Shall Contain.

No. 4228.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

It is hereby agreed between Hanun Gardner, attorney of record for the First National Bank of Gulfport and Mize & Mize and Mayes & Mayes, attorneys of record for Wirt Adams, State Revenue Agent, that the following shall constitute the record in this cause on the appeal to the Supreme Court, to-wit:

Plea of objection filed April 27th, 1918.

Demurrer to plea filed April 27th, 1918.

Order sustaining demurrer to plea filed Apr. 27th, 1918, Cause No. 19703 now in the Supreme Court.

2 It is further hereby agreed that the bond for appeal with supersedeas is fixed at the sum of One Thousand (\$1,000.00) Dollars.

HANUN GARDNER,

Att'y for First National Bank of Gulfport.

MAYES & MAYES &

MIZE & MIZE,

Att'ys for Wirt Adams, State Revenue Agent,

By S. C. MIZE.

Attest:

A. J. RAMSAY, JR.,

Clerk.

Nov. 18, 1919.

Filed Nov. 18th, 1919. A. J. Ramsay, Jr., Clerk.

Further Plea or Objection.

THE STATE OF MISSISSIPPI,
Harrison County:

In the Circuit Court, April Term, 1919.

No. 4228.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK.

Further Plea or Objection.

This cause having been on the 14th day of January, 1918, reversed and remanded by the Supreme Court of Mississippi, opinion reported 77, Southern Reporter, page 195, and the mandate being this day filed, the said cause being now docketed for a trial anew. comes the defendant, the First National Bank of Gulfport, leave of the Court being first had and obtained, and consolidating and amplifying its pleas and objections heretofore filed, and extending same to said attempted proceeding to levy and assess the back-taxes on said defendant bank as shown further in said proceedings, and especially so as to more distinctly and specifically raise the various Federal questions which this defendant avers it is entitled to have
3 heard and determined in this cause for such its defence, plea and objections, says:

First. That the said defendant, the said First National Bank of Gulfport is a National Banking Association, organized and existing under the National Banking Laws of the United States and domiciled in the City of Gulfport, in the County and State, and was so organized subsequently to February 1st, 1902, but prior to February 1st, 1903. That the said Bank was not on February 1st, 1903, or at any time subsequent thereto, the owner or holder in anywise of any of its shares of stock in said bank. That on the first day of February, 1903, and on February 1st, 1906, and February 1st, 1907, and at all times during said years the total of the shares of the capital stock of said bank was owned by divers and several individual owners or holders thereof, being approximately sixty such owners, living at various places in the State of Mississippi and some in other States, and that although from time to time during the years aforesaid as hereinafter mentioned there were various transfers and sales of stock from one individual owner to another, and the total number of stockholders varied slightly, nevertheless on the date next hereinafter mentioned the stock ownership remained diverse among many individual owners as aforesaid, and no share or shares of said bank was ever held or owned by it, said bank, in any manner whatsoever.

Second. That although said bank did not during any of said years or at any time previous to or since the date next hereinafter mentioned own or hold in any manner any of its shares of capital stock, and although section 5219 of the Revised Statutes of the United States, permitting the shares of National Bank Stock to be assessed by the State, permits same to be assessed only to and in the names of the owners thereof, to-wit, the stockholders, the plaintiff Revenue Agent of the State of Mississippi on the 29th day of July 1908, acting under and solely under section 4740 of the Code of 1906 of said state, gave notice to the sheriff of said county and State that he had assessed the said defendant First National Bank of Gulfport for the years 1902 to 1907 inclusive on the following described property as set out in said notice, to-wit: "Capital stock surplus and undivided profits, amounting to \$75,150.00 belonging to and owned by First National Bank for each of the said years" on the therein asserted claim and demand that said property of said bank had escaped taxation by reason of not being assessed, and required thereby that said sheriff should serve notice on said bank of said proceeding which said sheriff accordingly did on the 30th day of July, 1908. A true copy of said notice and the service thereon is annexed hereto as Exhibit "A" and made a part of the averments hereof. That as required by section 5210 of the Revised Statutes of the United States the cashier of said bank kept at all times in said bank subject to the inspection of all shareholders and of the officers authorized to assess taxes under state authority, a full and correct list of the names and residences of all the shareholders in the said banking association, and the number of shares held by each, and as same were so held from time to time throughout all said years 1903 to 1907, all of which could have been obtained by said Revenue Agent and said sheriff upon request during any business hour, yet no such request was made of said cashier at any time by said Revenue Agent or by said sheriff, and said notice of said additional or back tax assessment, as set out in Exhibit "A," was never given to or served upon the stockholders or owners of the shares of the said stock in said banking association, or upon any one of them, but was served solely upon said bank as if and under the claim and demand that it was the property of said bank which was declared to have escaped taxation, and which was to be additionally assessed for back-taxes, and no other notice was ever given or service made in any other manner or form or to or upon any other person or persons than as set forth and shown by the said sheriff's return on the bottom of said Exhibit "A."

Third. That the manner of assessing banks in the State of Mississippi, and the only method provided by the laws of said state therefor, is as set out in sections 4273, 4274 and 4275 of the Code of 1906 brought forward from the Acts of 1890 which provide that the president or other officer having like duties of each bank shall deliver to the assessor a written statement under oath of the number and amount of all the shares of capital stock paid in, and the sum of all undivided profits or surplus or accumulation of any sort constituting

part of the assets of the bank and not including its real estate, and that such shall be the basis of taxation thereof except that if such shares be worth less than par they shall be valued accordingly, and providing further that the bank so assessed shall pay the taxes under penalties for failure so to do. There is no provision in said sections of said laws, or anywhere in the laws of said state, for assessing shares of national banks in the names of the stockholders, or in any wise to the stockholders except as in said sections set forth, and not in those as this defendant avers upon legal advice. The said defendant bank not desiring to avoid any just or customary share of the burdens of taxation, made out by its vice-president and delivered under oath to the assessor for the years 1903, 1906 and 1907 said sworn statements, true copies of same being hereunto annexed as Exhibit "B," "C," and "D," and hereinafter each more specifically referred to. The first day of February of each year is the fiscal date in the State of Mississippi and was in all of said years for and upon which is based the assessment of all taxable property. On said February 1st, 1903, the capital stock paid in of said bank was \$100,000.00. In addition it had a book surplus and undivided profits account of \$5,000.00 and \$2,938.56, respectively. Out of this it had purchased real estate for its banking house which was assessed and taxed on the land roll of said county amounting to \$7,500.00. Into its surplus and undivided profits was carried interest to maturities of all paper, against which there was unearned interest of \$6,060.39, in other words, by the time required after said date February 1st to reach the maturities aforesaid, the interest aforesaid lacked said amount of equalling the maturities carried into the assets as earned. This and said real estate deducted left a balance of \$94,578.29. On its said return or statement for said year said bank requested a deduction from this amount of \$23,595.57 for insolvent credits. This was in accordance with the universal custom and practice which then and for a long time had prevailed throughout the said State, to-wit. to allow banks to make a deduction as should be deemed reasonable by the bank and by the assessing officers of an amount sufficient to cover any probable losses on account assets carried by it among its bills and notes receivable, through failures, bankruptcies and, other emergencies and losses which were occurring especially in a rapidly developing community such as was the community in which said bank was located. This deduction was allowed by the assessor and by the Board of Supervisors which latter body was in said year and throughout all the years herein mentioned the final board of equalization and review of all assessments real and personal in said county, and said assessment of said bank for said year was so approved and placed on the personal assessment roll at \$70,782.72 and all taxes demanded thereon for said year were paid by said bank to the tax collector both state and county. The said return and said statement is Exhibit "B" herewith, and is made a part of the averments hereof. That likewise for the year 1906 as of the date February 1st thereof the said bank by its vice president made out and delivered to said assessor its statement under oath showing capital stock paid in, and the surplus and undivided profits as carried on its books, less its bank-

ing house of \$25,000.00 which had been separately assessed
7 on the land roll and less two items of \$2,715.98 and \$17,-
809.38 unearned interest which was a debit against the item
of undivided profits as aforesaid, and it also claimed a reduction of
\$89,047.00 for probable insolvent credits in the same respect as set
forth as to the returns of 1903, and the said terms being deemed ap-
propriate and reasonable were allowed by the assessor and the said
Board of Supervisors, and the assessment of said bank was approved
and allowed by them for said year at a total of \$174,000.00, and all
taxes were paid on such said assessment for said year. A true copy
of said return and statement is hereto annexed as Exhibit "C" and
made a part of the averments hereof. That likewise for the year
1907 said bank through its vice-president delivered to the assessor a
sworn statement as of date February 1st, 1907 showing capital stock
paid in of \$250,000.00 and of surplus and undivided profits as
shown on its books of \$76,500.00 less the same sum of \$25,000.00
being the real estate of its banking house separately assessed on the
land roll of said county, and less two items of \$4,650.00 and \$21,-
200.00 for unearned interest which were debits against the said un-
divided profits. The said statement also as recognized by the custom
and practice aforesaid claimed a reduction of \$103,000.00 for prob-
able insolvent credits, in the same respect and for the same reasons
as set forth heretofore in said respect with reference to the statements
of said previous years, and the said statement and all the facts there-
inabout having been examined and reviewed by the said assessor and
said Board of Supervisors same was approved and allowed as so stated
except that the allowance of \$106,000.00 requested for probably in-
solvent credits was reduced by said taxing authorities to approxi-
mately \$100,000.00 and the final assessment of said bank was made,
8 passed and entered on the personal assessment roll for said
years at \$174,000.00 instead of \$168,650.00 as requested by
said bank, and all taxes on said assessment as so finally passed
and entered for said year 1907 was paid by said bank. The said
statement for said year 1907 is hereto annexed as Exhibit "D" and
made a part of the averments hereof. That therefore for each of
said years 1903, 1906 and 1907, the said bank submitted and re-
turned in writing under oath a full, true, complete and accurate state-
ment of the entire — of the capital stock paid in, and of the surplus
and undivided profits without withholding or concealing from said
taxing authorities any part or portion thereof whatsoever. No item
or part thereof was either wilfully, or accidentally, or inadvertently
or otherwise omitted in making said statements and returns, and all
the full and complete items and the full amounts thereof of and
what in particular each consisted of either as such stated assets, or
the deductions therefrom were therefore laid before the said assessor
and then before the said Board of Supervisors for each of said years,
and were seen and examined by and fully known and made mani-
fest to them and all of them and no part thereof escaped detection
by them or was withheld from their knowledge and consideration,
and each and every part thereof and the whole of each of said three
statements or returns were fully presented to all of them, examined

and heard by them, passed upon and judgment made by them and each and all of them and their said judgment and decision upon such inspection, knowledge, examination and full and true returns and statements, was that the said bank and the said property so shown on said returns exclusive of the real estate should be assessed at a total of \$70,782.72 for the year 1903, and \$174,000.00 for the year 1906 and \$174,000.00 for the year 1907, and all of said property having been so fully and completely placed before said taxing authorities,

and so known and seen, and examined, and passed upon, and
9 finally assessed for said years, the same became and were thereupon res adjudicata, and not subject to further inquiry

nor open to the claim that any of same had escaped taxation by reason of not being assessed. The said statements did not give the denominations of the shares of said stock, that is to say, the amount into which the same were divided for the reason that the national banking law fixes same at \$100.00 each share par value. That as to said allowed deductions for probable insolvent credits for said respective years the defendant bank says and avers that no losses suffered out of those for the year 1903, and that for the years 1906 and 1907 none had been definitely ascertained thereon (although some of them were gravely feared) when this proceeding was instituted on July 30th, 1908, but defendant avers that subsequently thereto there was ascertained and charged off as lost, and was so lost to said bank the sum of \$55,776.30, which was being in the said years 1906 and 1907 carried as assets and which were calculated into the figures which helped to make up the stated capital, surplus and undivided profits of said years, and which to the extent of said amount of \$55,796.30 has now been found as having justified said deductions of probable insolvent credits for said respective years at least to said above named amount. An itemized list of said lost debts due it and so making up a part of said assets for said years 1906 and 1907 is herewith annexed as Exhibit "E" and made a part of the averments hereof, same having been carried by said bank on the first day of February of each of said years 1906 and 1907 among its said book assets, but were charged off as lost subsequently to the institution of these proceedings, and the said defendant avers that each and every one of said items did to the amounts mentioned become wholly and hopelessly lost and insolvent and are so now, and although not definitely known so at the time were so uncollectible and insolvent in
fact on said February 1st, 1906 and February 1st, 1907, as
10 has now long ago been found and ascertained and so recognized as being charged off and taken out of the assets of said bank. This defendant in nowise waives its plea of res adjudicata by including the next above averment and exhibit, but makes said averment that the facts may be made known to the Court herein.

Fourth. The said bank avers that it did not own or hold any personal property of any kind other than that covered by said statements or returns Exhibits "B," "C" and "D" herewith; and no other or further returns or property was before said assessor and said Board of Supervisors than that shown in said respective statements or returns and the only personal property of said bank or concerning it

in anywise and passed on for said respective years was solely that shown in said returns, and the entry on the personal roll of each of said years respecting said bank was for and concerning said returns and statements, and those only were the matters that had been examined, heard and passed on by said taxing authorities, as respects in any manner said defendant bank for said respective years. That the personal assessment rolls of said county were in a form prescribed by law section 4270 Code 1906 and which had been the same for the previous years. This form provided fixed columns under which the assessor should place the personal property so assessed, and were furnished the said assessors by official authority of the State and said assessors could use no other. These columns contained headings for only that species of property commonly owned by the inhabitants of an agricultural and rural state as was Mississippi. There was nowhere on said roll any separate column for capital, surplus and undivided profits of banks. There was no blank column on said roll for the assessor to fill out for any other or different species of property than those given in the form provided by the section aforesaid. A sheet from said official personal assessment roll so in use in said years, and the only form so in use, or which lawfully could be used

as aforesaid is herewith annexed as Exhibit "F" and made a
11 part of the averments hereof, and same is filled out as said bank's assessment appears for the year 1907, the assessment for the year 1906 being in the exact same manner and form. Therefore the assessor and Board of Supervisors in the year 1903 in seeking the most appropriate column they could use placed the defendant's bank assessment for the year under column "Amount of money on hand etc." And for each of the years 1906 and 1907 under the column "Amount of all other Personal Property not otherwise mentioned," but defendant avers and repeats that no other matter or thing was before the said taxing authorities for said respective years than the said returns so made for them respectively and exhibited herewith, and no other matter than those returns and the matters and things brought before said taxing authorities therein and thereby were the precise points decided by said taxing authorities, and for which such said entries were made on said rolls as aforesaid, and there was neither anything else or any other property of or concerning said bank before said authorities for said respective years than those set forth in said exhibited returns and statements, nor was there any which could have been so before the said authorities in such respect, first, because as a matter of fact said bank owned no other personal property, and second, because as a matter of law it was not taxable in any event for any other species of personal property. And defendant avers that the said entries on said rolls were so far as said entries of themselves affect the matter, the entries of the final judgment of the said taxing authorities on said assessments for said respective years, in fact covered and referred to no other matter, and could have referred to or covered no other matter, and no other matter or thing was at any time during said years before said authorities for their action respecting said bank or any property contained or connected with it, and there was no other property of said bank

12 or connected with it either physically or in law owned by it or connected with it in any manner whatsoever which could become the subject of said entries other than the matters shown in said respective statements. So that defendant bank avers that as to the said matters the same are concluded and are res adjudicata, in which said judgments it has vested property right, and any deprivation of it of said rights by sustaining a collateral attack thereon would result in the deprivation of defendant of those rights and of the property by the arbitrary exercise of the machinery and powers of State Government, and contrary to the established principles of private rights and contrary to the Constitution of the United States, and to the Fifth and Fourteenth Amendments thereof.

Fifth. That the shares of stock in said bank and the taxes aforesaid for said years were never assessed against or to the stockholders of said bank as such nor in anywise in the names of said stockholders. There was no assessment against the individual stockholders of said bank each on his respective ownership of said shares and then a demand upon the bank to pay all of same for said stockholders, but the statutes treated same, and the taxing authorities treated same during said years as the property of the bank and assessible to it in its name and no wise in the name of said stockholders, and the said bank merely yielded obedience to the course and demand of said taxing authorities in so treating and in proceeding in the premises as aforesaid, and when this cause was first heard before the Board of Supervisors, and before the Circuit Court, wherein it was so heard in November 1909, it was still treated as an assessment against the bank and as to the property of the bank. It was so presented to the Supreme Court of Mississippi, which said court so treated it and declared in repeated sentences in its opinions 66 Southern Reporter 407 that it was an assessment of the bank of its property, and it held

13 that for the years 1902 and 1904 and 1905 the defendant was not liable, and as to those years affirmed the decision of the Circuit Court and for which reason said years are no longer in controversy, and are therefore omitted from this plea. That thereupon when said cause was remanded to this Court for a new trial as to said years 1903, 1906 and 1907, this defendant made further plea and objection that the said proceeding was against the bank as a bank and not against the stockholders, and was not in conformity with the permissive provisions of sec. 5219 of the Revised Statutes of the United States, and defendant now more fully avers that by the proceedings no notice has been given "to the persons whose property is assessed" by said attempted back tax proceedings. No notice has been given to or served upon any stockholder as a stockholder of said bank, not even upon those resident in said county and State, (of whom there are a large number) under these proceedings, and this proceeding is therefore not against any stockholder in said bank, but is solely against the said bank itself, in the first instance, and from beginning to end. This defendant says there is no statute of the United States permitting back-tax proceedings against stockholders of national banks and that property of or connected directly with national banks can only be assessed by State authority as permitted

by Act of Congress. Defendant says furthermore that there is no statute of the State of Mississippi allowing back tax proceedings against stockholders in national banks except upon jurisdictional notice to the individual owners or holders thereof. Defendant says that the statutes of said State do not make and has wholly omitted to make any person or corporation the agent or agents of the said individual owners of said shares to receive or accept said notice, and defendant says that no stockholder past or present of said bank has authorized or requested it in any manner to accept any such notice or service for said stockholder, nor has any stockholder, past or present, of said bank authorized or requested it to pay out any

14 back taxes on his said stock or on any other stock in said bank individually or in solido, but each of said stockholders so far as any expression from them has been received deny both the right and authority of said bank so to do, and it has not so done so far as acting for any stockholder is concerned. So that therefore not only has there never been any taxes assessed to the stockholders of said bank, but that even now by this proceeding there is no attempt to assess any back taxes to any shareholder, but the attempt is solely to assess same against said defendant bank, and to it and in its own name, and to no other, and in no other manner.

Sixth. This defendant says that during and since the year 1903 and up to the service of the said back tax notice on defendant on July 30th, 1908, there had been divers transfers and sales of its stock from individual owners to other individual owners at the then full market price and value, so that during said time fully 20 per cent of the said stock changed hands. That some of those who sold said stock are long since dead, and their estates dissipated and gone, others have departed to residences unknown to this defendant, and divers others have become insolvent, and some of same before the said July 30th, 1908, and some since said date. And none of them who so sold have any funds of any kind or stock or any other property with or in said bank, nor did they have on the 30th day of July, 1908, or have they had since. To permit the maintenance of this proceeding therefore, would require this defendant to pay out of its funds for taxes due by said dead or departed or insolvent former stockholders on their said shares so sold and transferred, and which funds so taken from this defendant would be the property in equity of the present shareholders of said bank, and of those stockholders who have long since — dates become such shareholders, and who are in no wise obligated in right of law to so pay said debts or taxes of

15 said former shareholders, thereby resulting in the taking the property of one person to pay the taxes of another distinct person,—taking the equitable property of one person and giving it to paying the obligation of a wholly separate person arbitrarily, without due process of law, by a proceeding wholly non-jurisdictional, without the substance of the law and without due process thereof, all in contravention of the guaranties of the Constitution of the United States and its amendments, more especially of the Fifth and Fourteenth Amendment- thereof, and of common

right as well. All of which said matters and things, pleas, objections and averments this defendant bank is ready to verify. Wherefore it prays judgment, etc.

GRIFFITH & WALLACE,
Attorneys for First National Bank, and
HANUN GARDNER.

THE STATE OF MISSISSIPPI,
County of Harrison:

This day personally came and appeared before me the undersigned authority in and for said County and State, A. C. Purple, who on oath states that he is the duly elected, qualified and acting cashier of the First National Bank of Gulfport, Mississippi. That he has been continuously connected with said bank first as assistant cashier and later as cashier from and including the first day of February, 1903 to this date, and that the matters and things set out and contained in the above and foregoing plea and objections are each and all true as therein stated, so far as the statements therein are statements of fact, and such averments as are made therein on legal advice he has been so advised and believes the same to be true.

A. C. PURPLE.

Sworn to and subscribed before me this the 12th day of April,
A. D. 1918.

[SEAL.]

A. F. KELLY,
Notary Public.

16

EXHIBIT "A."

Notice to Assess.

To the Tax Collector of Harrison County, Mississippi:

You will take notice and you are hereby notified that the following described property, in said County, to-wit: Capital Stock, surplus, undivided profits, and any and all other property properly assessable to banks, amounting to \$75,150, belonging to and owned by First National Bank of Gulfport has escaped taxation during each of the years 1902, 1903, 1904, 1905, 1906 and 1907, by reason of not being assessed.

You are by virtue of the Annotated Code of Mississippi of 1906, Chapter 131, Sec. 4740, now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment, on the roll or tax list in your hands, and to give ten days' notice in writing to said First National Bank whose property is so assessed, and also notify in writing the Board of Supervisors of said County, of said assessment.

Herein fail not, under penalties imposed by said Code.
Witness my signature, this the 29th day of July, 1908.

WIRT ADAMS,
State Revenue Agent,
By ALFRED D. GALLOWAY,
Deputy.

I have this day executed the within writ, personally by delivering to the First National Bank, by handing to W. A. King, Vice President of the said First National Bank a true copy of this writ, this the 30th day of July, A. D., 1909. WM. REEVES, JR.,

Sheriff,

By F. L. PATENOTTE, D. S.

17 EXHIBIT "B."

Statement of Assessable Property of First National Bank of Gulfport, Miss., February 1st, 1903.

Capital Stock paid in	\$100,000.00	
Surplus	5,000.00	
Undivided Profits	2,938.68	
	<hr/>	107,938.68

Less:

Real Estate	7,500.00	
Unearned Interest	6,060.39	
Allowance acct. insolvent credits	23,595.57	
	<hr/>	37,155.96

Total Amount Personal Property for assessable valuation	<hr/>	70,782.72
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Vice President.

Amount of taxes paid on above assessed property	884.78
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18 EXHIBIT "C."

Statement of Assessable Property of the First Nat'l Bank, Gulfport, Miss., February 1st, 1906.

Capital Stock Paid in	\$250,000.00	
Surplus and Undivided Profits	58,572.36	
	<hr/>	\$308,572.36

Less:

Real Estate	25,000.00	
Allowance 10% on Bills Receivable for insolvent credits	89,047.00	
Allowance 2% for interest on Outstanding Certificates of Deposit	2,715.98	
Allowance 2% for unearned interest on Bills Receivable	17,809.38	
	<hr/>	134,572.36

Total Amount of personal property for assessable valuation	<hr/>	\$174,000.00
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Vice President.

STATE OF MISSISSIPPI,

Harrison County, ss:

Before me, the subscriber, a Notary Public in and for said County and State personally appeared W. A. King, Vice President of the First National Bank, Gulfport, Miss., who, being duly sworn, says that the foregoing statement is correct and true to the best of his knowledge and belief.

Sworn to and subscribed before me, this — day of May, 1906.

19

EXHIBIT "D."

Statement of Assessable Property of the First Nat'l Bank, Gulfport, Miss., February 1st, 1907.

Capital Stock paid in	\$250,000.00	
Surplus and Undivided Profits	76,500.00	
		<u>\$326,500.00</u>

Less:

Real Estate	25,000.00	
Allowance 10% on Bills Receivable for insolvent credits	106,000.00	
Allowance 2% for interest on outstanding Certificates of Deposit	4,650.00	
Allowance 2% for unearned Interest on Bills Receivable	21,200.	
		<u>\$156,850.00</u>

Total amount of personal property for assessable valuation	\$168,650.00
--	--------------

Vice President.

STATE OF MISSISSIPPI,

County of Harrison, ss:

Before me, the subscriber, a Notary Public in and for said County, personally appeared W. A. King, Vice President of the First National Bank, Gulfport, Miss., who being duly sworn, says that the foregoing statement is correct and true to the best of his knowledge and belief.

Sworn to and subscribed before me, this — day of —, 1907.

County of _____

For the Fiscal Year 1907, and the State Tax at _____

Value of Jewelry	
Value of Gold and Silver Plate	
No. of Guns (over one)	
Value of same	
No. of Pistols, Bowie-Knives, Dirks, or Sword-Canes	
Value of same	
Amount of Capital employed in Merchandise	
Amount of Capital employed in Manufacturing	
Amount of Money (National Bank Notes, United States Legal Tender Notes, and other Notes and Certificates of the United States, payable on demand, and Circulating or in- tending to Circulate as Currency, and Gold and Silver or other Coin on hand or on de- posit or loaned.	
Amount of Indebtedness to the Party Assessed, which he regards as prob- ably collectible	
Amount of Household Furniture (over \$250.00 in value.)	
Amount of Bonds, Certificates, Warrants, Scrip or other forms of Indebtedness of the State, or any County, City, Town, Village, Board or Body capable of being a Debtor, held by the person rendering the list and in whose behalf it is rendered.	
Amount of all other Personal Prop- erty not otherwise mentioned	174,000
\$	
Aggregate State Tax at 6 Mills	
Cts.	
\$	

For the Fiscal Year 1907, and the State Tax at 6 Mills Due Thereon.

449

Amount of Capital employed in Manufacturing	Amount of Money (National Bank Notes, United States Legal Tender Notes, and other Notes and Certificates of the United States, payable on demand, and Circulating or in- tending to Circulate as Currency, and gold and silver or other Coin on hand or on de- posit or loaned.	Amount of Indebtedness to the Party Assessed, which he regards as prob- ably collectible	Amount of Household Furniture (over \$250.00 in value.)	Amount of Bonds, Certificates, Warrants, Scrip or other forms of Indebtedness of the State, or any County, City, Town, Village, Board or Body capable of being a Debtor, held by the person rendering the list and in whose behalf it is rendered.	Amount of all other Personal Prop- erty not otherwise mentioned	\$	Aggregate State Tax at 6 Mills	Cts.	\$	*Total Valuation subject to Ad Valo- rem Levee Tax	Cts.	EXEMPT PROPERTY							
												Number Horses	Number Mules	Number Cows	Number Sheep	Number Goats	Number Hogs	Number Asses	
					174,000														1
																			2
																			3
																			4
																			5
																			6
																			7
																			8
																			9
																			10
																			11
																			12
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23

Assessment of Personal Property and Polls in

Election Precinct, Supervisor's District No.

No. of Tax Receipt	NAMES OF PERSONS, CORPORATIONS, SOCIETIES, PARTNERSHIPS, OR FIRMS TAXED	Per Capita Road Tax	Total Valuation of Property	Poll (between 21 and 60 years of age)	No. of Cattle (over 2 Cows and Calves)	Value of same	No. of Oxen	Value of same	Number of Horses	Value of same	Number of Mules	Value of same	No. of Sheep and Goats (over one head)	Value of same	No. of Hogs (over ten head)	Value of same	No. of Carriages and other Wheeled Vehicles	Value of same	No. of Pianos, Organs, Melodeons	Value of same	No. of Watches	Value of same
1																						1
2																						2
3																						3
4																						4
5																						5
6																						6
7																						7
8																						8
9																						9
10																						10
11																						11
12																						12
13																						13
14																						14
15																						15
16																						16

EXHIBIT "F"

County of _____

For the Fiscal Year 1907, and the State Tax at 6 Mills Due Thereon.

450

Value of Jewelry	Value of Gold and Silver Plate	No. of Guns (over one)	Value of same	No. of Pistols, Bowie-Knives, Dirks, or Sword-Canes	Value of same	Amount of Capital employed in Merchandise	Amount of Capital employed in Manufacturing	Amount of Money (National Bank Notes, United States Legal Tender Notes, and other Notes and Certificates of the United States, payable on demand, and circulating or negotiable on credit as currency, and gold and silver and other coin on hand or on deposit or loaned.	Amount of Indebtedness to the Party Assessed, which he regards as probably collectible	Amount of Household Furniture (over \$250.00 in value.)	Amount of Bonds, Certificates, Warrants, Scrip or other forms of indebtedness of the State, or any County, City, Town, Village, Board or Body capable of levying taxes, held by the person rendering the list and in whose behalf it is rendered.	Amount of all other Personal Property not otherwise mentioned	\$	Cts.	\$	*Total Valuation subject to Ad Valorem Levee Tax	Cts.	EXEMPT PROPERTY						
																		Number Horses	Number Mules	Number Cows	Number Sheep	Number Goats	Number Hogs	Number Asses
																								1
																								2
																								3
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EXHIBIT "F"

22

Assessment of Personal Property and Polls in Gulfport

Election Precinct, Supervisor's District No. 2

No. of Tax Receipt	NAMES OF PERSONS, CORPORATIONS, SOCIETIES, PARTNERSHIPS, OR FIRMS TAXED	Per Capita Road Tax	Total Valuation of Property	Poll (between 21 and 60 years of age)	No. of Cattle (over 2 Cows and Calves)	Value of same	No. of Oxen	Value of same	Number of Horses	Value of same	Number of Mules	Value of same	No. of Sheep and Goats (over ten head)	Value of same	No. of Hogs (over ten head)	Value of same	No. of Carriages and other Wheeled Vehicles	Value of same	No. of Pianos, Organs, Melodeons	Value of same	No. of Watches	Value of same
1	First National Bank of Gulfport \$174,000																					
2																						
3																						
4																						
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11																						
12																						
13																						
14																						
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EXHIBIT "E."

The following notes and accounts were carried on our books as assets during the years 1906 and 1907, but later charged to profit and loss:

Our number.	Name.	Amount.
25343.	A. S. Hinton & Co.	\$2,500.00
25765.	Yellow Pine Export Co.	1,250.00
25763.	W. C. Gause	4,082.00
26262.	Miss. Transportation Co.	3,000.00
25764.	W. C. Gause	4,592.25
18863.	W. C. Gause and J. C. Miles	5,500.00
18667.	W. C. Gause	3,115.76
18668.	Miss. Timber Co.	11,700.00
19433.	Miss. Transportation Co.	365.00
27384.	" " " "	2,550.00
25344.	J. C. Pearson Lbr. Co.	2,500.00
22238.	A. S. Hinton & Co.	2,500.00
21272.	S. Favre, Agt.	300.00
23282.	H. F. Heustis	1,505.00
21387.	A. L. Hatten	302.60
21386.	Wiggins & Hatten	216.13
23597.	F. A. Cross Timber Co.	700.00
26221.	Collins Sawers Co.	50.00
16504.	" " " "	50.00
16031.	" " " "	25.00
26260.	H. A. Mills	150.00
20635.	O. E. Thompson	600.00
25309.	E. Small Lbr. Co.	147.56
19617.	Clay Dry Kiln Co.	400.00
19058.	L. C. Van Duzer	400.00
17749.	H. T. Frere	70.00
18796.	Clay Dry Kiln Co.	300.00
17313.	" " " "	450.00
17132.	" " " "	100.00

21

14541.	Am. Pitch Pine Co.	200.00
19252.	" " " "	1,300.00
14866.	" " " "	250.00
12009.	" " " "	225.00
17772.	A. J. Craner Co.	1,500.00
17870.	" " " "	1,000.00
17778.	" " " "	1,900.00
	Leggett & Co., Balance	1,000.00
		<hr/> \$55,796.30

Filed Apr. 27, 1918. A. J. Ramsay, Jr., Clerk, by E. McManus, D. C.

(Here follow sheets from State tax book, marked pages 22 and 23.)

24 *Demurrer to Plea.*

STATE OF MISSISSIPPI,
Harrison County:

No. 4228.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK.

Comes the plaintiff and demurs to the plea filed by the defendant on the 27th day of April, 1918, and prays the judgment of the court if he must make further answer thereto, and for cause of demurrer says:

First. Said plea states no defense to the cause of action of plaintiff and is insufficient in law.

Second. Said plea is invalid because of duplicity.

Third. Said plea is vague, indefinite and uncertain.

Fourth. Other causes to be assigned on hearing.

MAYES & MAYES &
MIZE & MIZE,
For Plaintiff.

Filed Apr. 27, 1918. A. J. Ramsay, Jr., Clerk, by E. McManus,
D. C.

25 *Judgment.*

No. 4228.

WIRT ADAMS, Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

This day this cause came on to be heard on the demurrer of the plaintiff to the plea of the defendant, First National Bank, said plea being filed on the 27th day of April, 1918, setting up that a national bank is not taxable and assessable as attempted to be levied by the State Revenue Agent, and the Court having heard and considered demurrer to said plea, is of the opinion that said demurrer should be sustained; and, leave being granted the defendant to plead further in open Court, the defendant declined so to do, and the Court is of the opinion that the plaintiff should have judgment and the bank should be assessed as directed herein by the Revenue Agent.

It is therefore by the Court ordered, that the Board of Supervisor

of Harrison County, Mississippi, be and they are hereby directed and ordered to assess the First National Bank of Gulfport, Mississippi, with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of \$75,150.00, for the years 1903, 1906 and 1907, which said property was at said time owned by said First National Bank and which had escaped taxation for each of the years as hereinbefore set out; and said Board of Supervisors is hereby directed to make such assessment by way of additional assessment on the roll and tax list of Harrison County, Mississippi; and said Board of Supervisors is further ordered to notify the Tax Collector of Harrison County of said Assessment. And it is further ordered by the Court that said defendant be taxed with all costs herein, for which let proper process issue.

26

(Summons.)

The State of Mississippi to the Sheriff of Harrison County, in said State:

You are hereby commanded to summon Wirt Adams, State Rev. Agt., (Mize & Mize and Mayes and Mayes), Appellee, or his Attorney in Fact of record if to be found in your County, to appear before the Supreme Court of the State of Mississippi, at the Capitol in the city of Jackson, in the County of Hinds, and State aforesaid, on the 5th day of January, A. D., 1920 then and there to answer the appeal of First National Bank of Gulfport, Miss., from a judgment of a Circuit Court of the County of Harrison in said State, rendered against said Appellant on the 17th day of April, A. D. 1919, at the March Term, A. D. 1919, of said Circuit Court in favor of said Appellee for Back Taxes years, 1903, 1906 and 1907, and have there then this writ.

Given under my hand and seal of said Circuit Court, at my office at Gulfport, Miss., and issued this the 8th day of Nov., A. D. 1919.

[SEAL.]

A. J. RAMSAY, JR.,

Circuit Clerk.

Sheriff's Return.

I have this day executed this writ personally upon Wirt Adams, State Rev. Agt., by delivering to S. C. Mize of the firm of Mize & Mize, attorneys of record for the within named Wirt Adams, State Rev. Agt., a true copy of this writ.

This 10th day of Nov., 1919.

J. B. CLARK,

Sheriff,

By D. H. KING, D. S.

Ex. 1.50

E. & R.50

\$2.00

Endorsed on back: Received in my office this the 10th day of Nov. 1919. J. B. Clark, sheriff, by F. L. Patenotte, D. S. Filed Nov. 12, 1919. A. J. Ramsay, Clerk, by E. G. Lindsey, D. C.

Supersedeas Bond.

THE STATE OF MISSISSIPPI,
Harrison County:

Know all men by these presents, That we, The First National Bank of Gulfport, Miss., principal and sureties are held and firmly bound unto Wirt Adams, State Revenue Agent in the sum of One Thousand (\$1,000.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and delivered this the 18 day of November, A. D., 1919.

The Condition of this obligation is, That Whereas, a judgment was rendered by the Circuit Court of the County of Harrison in said State, on the 17th day of April, A. D., 1919, at the March Term, A. D., 1919 thereof, in case No. 4228 in said Court against The First National Bank of Gulfport, Miss., in favor of Wirt Adams, State Revenue Agent for back taxes, as per the several various levies:

Now, if said The First National Bank of Gulfport, Miss., principal obligor herein and appellant, will satisfy the said judgment, and also such final judgment as may be made in said cause, and all costs, if the said judgment of said Circuit Court be affirmed by the Supreme Court of the State of Mississippi, to which Court an appeal from said judgment of said court is to be prosecuted, then this obligation shall be void.

FIRST NATIONAL BANK
OF GULFPORT, MISS.

P. A. STILWELL,
Cashier.

A. C. PURPLE.
J. VAN HOOSTEN.

The above bond is approved and filed, this the 19th day of Nov. A. D., 1919.

A. J. RAMSAY, JR.,
Circuit Clerk.

Endorsed: Filed this 19th day of Nov., 1919. A. J. Ramsay, Jr., Clerk.

Circuit Clerk's Certificate.

THE STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Jr., Clerk of the Circuit Court of said County and State, hereby certify that the foregoing 32 pages contain a true, correct and complete transcript of the record in cause No. 4228, styled Wirt Adams, State Revenue Agent versus First National Bank of Gulfport, Miss., as agreed upon, including the Judgment appealed

from, as the original of same appears of record and remains on file in my office.

Given under my hand and official Seal of office, this the 18th day of November, A. D., 1919.

A. J. RAMSAY, JR.,
Clerk Circuit Court, Harrison County, Mississippi.

Statement of Fees.

To A. J. Ramsay, Jr., Circuit Clerk:

For Transcript, Certificate, Summons, Binding Fee, etc. \$14.80
which has not been paid.

To J. B. Clark, sheriff:

For executing S. C. Summons \$2.00
which has not been paid.

Total \$16.80

A. J. RAMSAY, JR.,
Clerk Circuit Court, Harrison County, Miss.

Endorsed on back of Record: Filed Nov. 22nd, 1919. Geo. C. Myers, Clerk, Supreme Court.

29 *Organization of Supreme Court.*

Minutes of Supreme Court of Mississippi, October Term, 1919.

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of the State of Mississippi Begun and Held at the Court Room in the City of Jackson, State of Mississippi, at the Capitol, on the Second Monday of October, being the Thirteenth Day of October, A. D. 1919.

Present and presiding: Hon. Sidney Smith, chief justice; Honorable Sam C. Cook, Honorable Geo. H. Ethridge, Honorable Eugene O. Sykes, Honorable J. B. Holden, associate justice; Geo. C. Myers, Clerk, and C. L. Johnson, Marshall.

The following proceedings were had and done, to-wit:

30 In the Supreme Court of Mississippi.

No. 21035.

FIRST NATIONAL BANK OF GULFPORT, Appellant,

vs.

WIRT ADAMS, State Revenue Agent, Appellee.

Assignment of Errors.

Comes the appellant, First National Bank of Gulfport and alleges that there is manifest error etc. as follows, to-wit:

1st. The Court erred in sustaining the demurrer of appellee to appellant's further Plea or Objections, said plea being set out pp. 3 to 18 incl. of the present record.

2nd. The court erred in entering judgment on the record even without said plea.

Respectfully submitted,

HANUN GARDNER,
GRIFFITH & WALLACE,
Attorneys for Appellant.

We hereby certify that we have this day delivered a copy of above assignment of errors to Mize & Mize, attorneys of record for appellee. This January 5th, 1920.

GRIFFITH & WALLACE,
Attorneys for Appellant.

Endorsed on Back: Received and Filed Mar. 10th, 1920. W. J. Buck, Clerk, by W. J. Brown, D. C.

31 *Order Submitting.*

Minutes Supreme Court of Mississippi, March Term, 1920.

March 23rd, 1920.

No. 21035.

FIRST NATIONAL BANK OF GULFPORT

vs.

WIRT ADAMS, State Revenue Agent.

Submitted on briefs by Hanun Gardner for Appellant and Mize & Mize for Appellee.

Judgment of Supreme Court.

June 14th, 1920.

No. 21035.

FIRST NATIONAL BANK OF GULFPORT

vs.

WIRT ADAMS, State Revenue Agent.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Harrison County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the March Term, 1919, on the 17th day of April, 1919, be and the same is hereby affirmed and that appellee do have and recover of appellant and A. C. Purple and J. Van Cloostere, sureties in the appeal bond the costs of this cause in this court and in the court below, etc.

Minute Book W., p. 60.

Opinion of Court.

In the Supreme Court of Mississippi, in Banc.

Smith, C. J.

(6113.)

No. 21035.

FIRST NATIONAL BANK OF GULFPORT

vs.

WIRT ADAMS, State Revenue Agent.

This cause is controlled by the decisions rendered on former appeals thereof.

Affirmed.

Endorsed: Filed June 14th, 1920. W. J. Buck, clerk, by W. J. Brown, D. C.

Suggestion of Error.

No. 21035.

FIRST NATIONAL BANK

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WIRT ADAMS, Revenue Agent.

We are denied the benefit of the knowledge of the principles of law, or the existence of what facts, which convinced the Court that the judgment of the lower Court should be affirmed, and as the process of reasoning of the Court, which lead to an affirmance, is not disclosed, it becomes more difficult for us to point out the particular error into which the Court has fallen in an affirmance of the case; but so convinced are we, after a painstaking examination of the record in this case, and the law applicable thereto, that the Court has unwittingly fallen into error, we deem it our duty to file this suggestion of error, not merely as a matter of form, but with the sincere belief that on due consideration thereof it will be sustained.

In announcing the affirmance in this case, the Court says: "This case is controlled by the decisions rendered on the former appeals therein." The other two opinions in this case were alike only in that the cases, in each instance, were reversed on appeals by the State Revenue Agent, and in every other particular they held to the exact contrary of each other. The holding of the Court in the first appeal, 66 So. Rep. 407, was to the effect that the assessment was lawfully made directly against the bank, and the opinion of the Court on the second appeal, 77 So. Rep., 195, expressly admitted that the capital stock of a national bank cannot be legally assessed directly against it. The two decisions are in irreconcilable conflict with each other, so we do not yet know what is the law of this State applicable to such state of facts as exists in this case.

We are at a further disadvantage in presenting this matter to the court for the reason we are not advised whether the many
 33 Federal questions raised and presented in the plea in behalf of the bank were considered by the Court as not well taken, or whether the Federal questions presented influenced its conclusion, but from the wording of the announcement of the affirmance, we are forced to the conclusion that the Court did not consider the Federal questions plead as a defense to this action as controlling in the decision reached.

So contradictory are the first two decisions of the Court in this case that the Court in its opinion, 77 So. Rep., 195, does not cite in support of its conclusion the opinion on the first appeal herein, 66 So. Rep. 407, this latter decision being wholly ignored, no doubt on account of its unsoundness. The first decision in this cause was emphatically overruled by the opinion on second appeal in so far as the first decision held the assessment was lawfully made, though the

Court did not in express and specific words recite that it was overruled.

We can with confidence ask the Court to reverse this case on this suggestion of error solely upon the state of the pleadings themselves. Even disregarding, for the sake of argument, all other questions as presented in this suggestion and in the other briefs filed in this cause, there is no principle of law in our jurisprudence more strongly or more firmly established than that a demurrer admits as true all facts well pleaded. We insist that upon a re-examination by the Court of the record in this cause the Court will be irresistibly forced to the conclusion that there was an error committed by the Court in not reversing the case upon the strength of the principle just announced. We think that we only have to call the Court's attention to the state of the record in reference to this particular phase of the case in order that it may fully appreciate the soundness of the legal point we now raise.

34 The plea of the bank to the notice of the assessment specifically and in detail averred the following facts: That the capital stock of the bank for the year 1903 was the sum of \$100,000.00, surplus, \$5,000.00, and undivided profits, \$2,938.56, making the total resources of the bank of all kinds, real and personal, for that year, the sum of \$107,938.56; that out of the said total resources the bank had invested in real estate the sum of \$7,500.00, and that real estate to that amount was assessed against the bank. (R. p. 7), and that the bank was assessed on its capital stock and surplus on the personal roll in the sum of \$70,782.73 (R. p. 8). The total assessment against the bank for the year 1903, real and personal, was the sum of \$78,782.72.

The plea sets up and specifically avers that \$107,938.56 represented the value of all of the property belonging to the bank. The exhibit filed with the plea for the bank for that particular year recites that it was entitled to a deduction for possible insolvent credits of \$23,000.00, and another item of unearned interest in the sum of \$6,000.00. Conceding that the bank was not entitled to a credit for this unearned interest in the sum of \$6,000.00, nor entitled to a deduction of \$23,000.00 for possible insolvent credits, the utmost amount for which the bank could be assessed for the year 1903, without a bold confiscation of its property under the guise of taxation, was the total and aggregate sum of \$107,938.56. This last named sum is the undisputed record evidence in this case of the actual and total cash valuation of every species of property owned by the bank as of February 1st, 1903. The demurrer to the plea of the bank admits that valuation to be absolutely and unequivocally true; there was no evidence of any kind introduced in this case, the final judgment being rendered on the demurrer. The record therefore shows as clear as a noon day sun that it is admittedly true that the total resources of the bank of all kinds and character had an actual value for the year 1903 of \$107,938.56, and to assess

35 the bank on the admitted state of the record in any sum in excess of the last named sum would be an unlawful taxation of the property of the bank, would be denying the bank the equal

protection of the law, and nothing more or less than confiscation of the property of the bank under the guise of law.

The record shows and the State Revenue Agent admits that the bank was assessed in the sum of \$78,782.72 for the year 1903. It therefore follows as a simple and elemental proposition of right and law, under the admitted state of the record, that the bank could not legally and lawfully be assessed at any additional sum except the difference between the assessment as made for the year 1903, and the total valuation of the bank's property of all kinds for said year, which was \$107,938.56. The difference between the assessment of the bank on which it paid taxes for the year 1903 and the total admitted value of all property of the bank for said year is the sum of \$29,156.84, which last named sum is the only additional assessment that the Board of Supervisors, could, on the institution of these proceedings by the State Revenue Agent, have made against the bank, and certainly neither the Circuit Court nor this Court can enter a judgment for an additional sum against the bank for that year in excess of the said amount of \$29,155.84.

We direct the Court's attention to the fact that the judgment of the Circuit Court is that an additional assessment should be made against the bank for the sum of \$75,150.00 for the year 1903, the amount of which said judgment added to the amount for which the bank was assessed for said year and on which it paid taxes, \$78,782.72, makes a total assessment for said year, if the judgment of the Circuit Court is allowed to stand, of \$153,932.72, which said total amount is \$45,994.16 in excess of the total admitted cash value, as shown by the record, of all property of every kind and character belonging to the bank. We are merely quoting the facts as shown by the record, and certainly all we need to do to secure a reversal of the case is to call the Court's attention to this clear error on the part of the lower Court in rendering a judgment against the bank for an additional assessment of \$75,150.00 for the year 1903, which of necessity and as a matter of right and law, made the assessment against the bank for the said year \$45,994.16 in excess of the actual admitted cash value of all the property of every kind belonging to the bank. We called the Court's attention to this fact in our briefs, but we devoted so much more of the time in the briefs to other issues involved that we presume that the Court overlooked or did not fully appreciate this very vital and important phase of the case.

To affirm this case under the present admitted state of the record, about which there cannot be the slightest controversy, the Court will, of necessity, overrule a principle of law as old as our jurisprudence and as much a fixed principle of law as the maxim: "A right of action cannot arise out of fraud"; and if the Court holds that this case should be affirmed on the present admitted state of the record, then the whole province and purpose of a demurrer is abolished by the Court.

The record shows that the total value of all the property of every kind owned by the bank in 1903 had an actual value of a little over \$107,000.00, which was set forth in detail in the plea of the bank.

If the judgment of the Court had been that the bank should be back assessed for the year 1903 on an additional sum of \$250,000.00, would this Court then have permitted such an outrageous judgment to stand? And what again if the judgment of the
37 lower Court had been for an additional sum of \$250,000.00 for the years 1906 and 1907, making the total assessment for all said years the sum of \$750,000.00, and to pay the City, County and State taxes would practically consume the entire capital of the bank, with the same plea filed in such a case as in the instant case, precisely similar, word for word, would this Court then have permitted the judgment of the lower Court to stand? The Court cannot answer these questions by stating that these are hypothetical and extreme illustrations, for a Court does not decide a case according to the amount involved, but it does decide a case according to the very justice, right and law of the case. If right and law are in favor of a litigant, he is just as much entitled to a decree of the court in his favor, in a case involving \$100.00, as if the amount involved was \$50,000.00. It is true the amount involved in this case may not exceed \$8,000.00, but if the law and right are in favor of the bank it is just as much entitled to a judgment in its favor as if the assessment amounting to \$750,000.00 had been made against it by the lower court as set forth in the illustration above. We do not want the court to understand that we are standing upon a mere technical right, or insisting upon the Court upholding the hoary aged principle of law that a demurrer admits as true all facts well pleaded, only as an abstract principle of pleading, but we are insisting upon a very visible, positive, legal and equitable right, and the affirmation of this case denies both to the appellant.

Referring again to the two previous decisions of this Court in this cause, in both of which the Revenue Agent was the appellant, we insist that a decision of the Court on the second appeal, *Adams, State Revenue Agent vs. First National Bank*, 77 So. Rep. 195, is fundamentally unsound on every point except that the capital stock and surplus of a national bank cannot be assessed against the bank, as the attempt is made in this case. By an examination of
38 that opinion it will at once clearly appear that the Court based its reversal solely upon a presumed existence of a certain fact, when in truth the record discloses the very reverse of the assumed controlling fact. The sole basis upon which the Court based its opinion in reversing the case was the assumed existence of the fact of the request of the shareholders of the bank that it pay the taxes of the respective shareholders, and the Court, citing the admitted sound law, in cases where such facts actually exist, that "under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him."

The Court in case *supra* inadvertently fell into error, but a serious one, in assuming that the record showed that the shareholders had made in request of the bank to pay their taxes for them. The record does not show existence of any such fact or anything even in the slightest indicating the existence of such fact. Aside from this very serious error of the Court, the Court cited, in chief reliance for its

conclusion, the case of Dime Savings Bank vs. Des Moines, 205 U. S., 503, 27 Sup. Ct., 571. We are forced to suggest to the Court that this case furnishes no support whatever for the decision rendered in this cause on second appeal, and holds expressly to the contrary, supporting in its entirety the position of the bank in the pending cause.

We especially call your attention to the fact that the Des Moines case requires the taxes to be assessed to the owner, the shareholder. Quoting from that case, p. 910:

"The taxes assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, leaving to the corporation the right to reimbursement for the taxes paid from their shareholders, *either under some express statutory authority for their recovery*, or under the general principle of law that one who pays the debt of another, *at his request*, can recover the amount from him."

In the present case there exist neither statutory or common law right of the bank to recover of the shareholders any taxes it might now be required to pay. What if the taxes involved in this case on an assessment directly against the bank on its capital stock and surplus amounted to \$150,000.00, to pay which would make the bank insolvent, the necessary result of which would be the immediate appointment of a Federal Receiver of the bank by the Comptroller of the currency, would the Court then still hold that the assessment made directly against the bank on its capital and surplus is legal and valid, regardless and notwithstanding the provision of the Act of Congress, Sections 5210 and 5219 U. S. Revised Statutes, to the contrary.

Would this Court render a decision affirming a judgment on a record precisely like this one that would naturally result in the destruction of a national bank, at the same time keeping in view the decisions of the Supreme Court of the United States in the following cases: Owensboro National Bank vs. Owensboro, 173 U. S. 664; 43 L. Ed., 850; 19 Sup. Ct. Rep., 537; Bank of California vs. Richardson, 63 L. Ed., p. 212; Co-op. Advance Sheets, March 1, 1919, which case is the most recent one of that Court precisely in point. We can well surmise a case for recovery of back taxes for six years assessed directly against a national bank, the payment of which would destroy it as a governmental agency, which they are held to be in Davis vs. Elmira Savings Bank, 162 U. S., 283, and as such subject only to paramount authority of the United States.

The Legislature of the State of Mississippi has at last recognized that heretofore existing state statutes made no legal and valid provision for the assessment of the capital and surplus of national banks and at its recent session enacted a special statute providing

40 how national bank capital and surplus shall be assessed, which recent act of the legislature follows precisely the plan provided in Sections 5210 and 5219 U. S. Revised Statutes. The new State Statute also makes provision that the bank shall pay the taxes assessed against each of its stockholders as the agent of such

shareholders. The Legislature had the power to do this, that is a legislative prerogative, but the Courts cannot, by judicial construction, make the bank an agent of a single shareholder.

We submit this case cannot be affirmed without nullifying the Acts of Congress referred to, which authorize the States to tax national banks, provided they are taxed on the same basis of other monied capital. If this case is affirmed, the Court renders a judgment causing the bank to be assessed on a fictitious and false valuation of over \$153,000.00 for one of the years involved, when it is an established and admitted fact of record that the actual cash value of all assets and property of the bank is only \$107,938.56, which action will be in flagrant contravention of the laws of the State of Mississippi and of the United States.

We submit to affirm this case is to deny appellant the equal protection of the law guaranteed by both State and Federal constitutions.

To affirm this case means nothing less than the taking of the bank's property without due process of law.

It will mean nullification, nothing less, of the Acts of Congress upon a Federal question by the judgment of a State Court.

To affirm this case means nothing less than the abolishment of the universally recognized principle of law, that a demurrer admits as true the averments of facts in a declaration or plea.

For the reasons set forth in our briefs and those enumerated in this suggestion of error, we respectfully urge a reconsideration
41 of this cause.

Respectfully submitted,

HANUN GARDNER,
GRIFFITH & WALLACE,
Attorneys for Appellant.

I hereby certify that I have this day personally delivered to Messrs. Mize & Mize, attorneys for appellee, a true copy of this brief.
This the 22nd day of June, 1920.

HANUN GARDNER.

Endorsed on back: Received and filed, June 24th., 1920. W. J. Buck, Clerk, by W. J. Brown, D. C.

Order Overruling Suggestion of Error.

Minutes Supreme Court of Mississippi, March Term, 1920, July
12th, 1920.

No. 21035.

FIRST NATIONAL BANK OF GULFPORT

vs.

WIRT ADAMS, State Revenue Agent.

This Cause coming on to be heard on the suggestion of error filed herein and this court having sufficiently considered the same, doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Opinion on Suggestion of Error.

In the Supreme Court of Mississippi, in Banc.

Ethridge, J.

(6144.)

No. 21035.

FIRST NATIONAL BANK OF GULFPORT

vs.

WIRT ADAMS, State Revenue Agent.

The suggestion of error asserts that the two former opinions in this case are inconsistent and that they are only alike in one respect, in that they were reversals of the court below. The two former opinions are reported in 108 Miss., 346, 67 So. 407, and 116 Miss., 450, 77 So. 195, and a careful examination will show that
42 they deal with separate propositions and are not in conflict one with the other.

It is insisted also in the suggestion of error that the appellant was entitled to a reversal on the pleadings; that the plea of the plaintiff was demurred to and the demurrer sustained, and that the plea set forth certain facts with reference to the amount of capital stock and surplus which it is contended the demurrer admits to be true and which amounts are less than the judgment rendered against the appellant.

The rule is that a demurrer admits all the facts well pleaded but it does not admit the truth of facts not well pleaded.

The Revenue Agent was the complainant and set forth his contentions in a notice of assessment. If any pleading by the defendant

was necessary at all the pleading would be one of two kinds, either a denial of the plaintiff's contentions, or, second, by confessing them and pleading in avoidance some affirmative matter which would discharge the obligation admitted in the pleading. The allegations in the present pleadings relied on do not fall in either class. It makes averments it is true, but the proper plea would have been a denial of the allegations. There was no confession of liability nor of facts from which liability would certainly be inferred with other averments avoiding the legal effect of such confession.

The other matters contained in the suggestion of error have been fully passed on in the former opinions. The suggestion of error will therefore be overruled.

Overruled.

43 *Organization of Circuit Court of Harrison County, November Term, 1918.*

THE STATE OF MISSISSIPPI,
Harrison County:

Be it remembered that a regular term of the Circuit Court of Harrison County, Mississippi, was begun and held in the City Hall of the City of Gulfport, in said County and State, the same being the time and place designated by the Board of Supervisors of said County and State, for holding said Court, on the Second Monday of November, A. D. 1916, being the 13th day of November, A. D. 1916 (the court house of said County and State having been destroyed by fire).

There were present and in attendance on said court, The Hon. Jas. H. Neville, Judge of the Second Judicial Circuit Court District of Mississippi, hereby sole presiding, J. B. Clark, Sheriff of said County, A. J. Ramsay, Jr., Clerk of said Court, and Robert L. Murphy, Official Court Stenographer of said Circuit Court District.

(Minute Book 14, p. 1.)

44 *"Plea."*

No. —.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK.

Now comes the First National Bank of Gulfport, in the State of Mississippi, one of the defendants in the above entitled cause, and for a further plea or objection, says that the said Plaintiff ought not to have or maintain his said action against it because it says that it was on the 23rd day of May, 1902, organized as a national banking association under the Acts of Congress relating to National Banks, and from said day and date continuously to the time of the filing of

the proceedings by said plaintiff against it in this cause has been and remained a national bank under said Acts of Congress, and that throughout said time it has never been the owner of any of its shares of stock, and it, the said bank, is not assessable on any of its shares of stock, or with any other personal property under the laws of the United States, and that any and all statutes or proceedings of the State of Mississippi or any of its officers, among which is Plaintiff, proposing or purporting to assess said defendant bank with other than its real estate is and are, and have been at all times wholly void; that the statutes of the said State of Mississippi throughout the whole of said period covered in these proceedings were, still are and have been out of conformity with the statutes of the United States, under and in accordance with the terms of which latter, the permissive power of the State to tax at all exists, and that no provision at any of said times existed or now exists under the statutes of the said State, to tax the shares of said national bank to the holders thereof, which shares are held by various individuals in said State and
 45 other States, and of which said individuals the said bank had not at any of said times, nor since any of their funds in its hands, with the exception of a few only of said shareholders, being less than 20% of them and this individually and not collectively or jointly.

And defendant further says that neither is there nor has there ever been, any statute of the said State of Mississippi under the provisions of which the Revenue Agent may legally proceed in conformity to the statutes of the United States against said National Bank as a bank, in any back tax assessment, such as it attempted in the present case. And, this the defendant is ready to verify. Wherefore it prays judgment, etc.

GRIFFITH AND WALLACE,

Attorneys for said Defendant.

(Endorsement on Back:) No. 4228. Adams vs. First National Bank. Plea. Filed 5/29/16. A. J. Ramsay, Jr., Clerk.

46

Demurrer to Plea.

STATE OF MISSISSIPPI,
Harrison County:

In Circuit Court to April Term, 1916.

No. —.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK.

Now comes Plaintiff in above styled cause, by attorneys and demurs to the plea filed herein by First National Bank, defendant, and assigns the following grounds for demurrer:

1. Said Plea is insufficient in law.
2. Said plea states no legal defense.
3. The plea on its face shows that defendant is taxable.
4. And for other causes to be assigned on the hearing.

MIZE & MIZE,
Attorneys for Plaintiff.

(Endorsements on Back:) No. 4228. State of Mississippi, Harrison County. Circuit Court. Wirt Adams, Revenue Agent, vs. First National Bank. Received and filed this the 29th day of May, 1916. A. J. Ramsay, Jr., Circuit Clerk, by E. McManus, D. C. Mize & Mize, Attys. for Deft.

47

Judgment.

Minute Book 14, page 44.

November Term, 1916, December 6th, 1916.

4228.

WIRT ADAMS, State Rev. Agent.

vs.

FIRST NAT'L BANK OF GULFPORT.

This cause coming on to be heard on the plea or objection of said defendant bank heretofore filed and objecting to said attempted assessment that it is not an assessment against the stockholders of said bank, in the name of said stockholders said bank being a National Bank, and that it is an attempt to assess the Banks itself in solido, and on the demurrer to said plea, and the Court having heard and considered same, and being of the opinion that said plea or objection is well taken in law and that said demurrer should be overruled, it is therefore ordered and adjudged that said demurrer should be overruled, and the said Revenue Agent, Plaintiff, by his attorneys, declining in open Court to plead further or make any other reply to said plea or objection, and it appearing that same is true in point of fact, it is therefore further ordered that the action of the Board of Supervisors of Harrison County, Mississippi, heretofore entered herein disallowing said attempted assessment for back taxes against said Bank be and the same is hereby in all respects affirmed.

Petition for Appeal.

Comes Stokes V. Robertson, State Revenue Agent for the State of Mississippi successor in office to J. C. Johnston, who was successor in office to Wirt Adams, and petitions for an appeal from the final judgment rendered in the cause originally entitled Wirt Adams,

State Revenue Agent vs. First National Bank of Gulfport, in the Circuit Court of Harrison County, on the 6th day of December, 1916, to the next term of the Supreme Court of the State of Mississippi, no bond being required of petitioner under the law for such appeals; and as in duty bound.

48 Petitioner further shows that this cause has been to the Supreme Court, being No. 14,176 in said Court, and remanded and the clerk will only send up that part of the record made on last trial subsequent to the remanding of said cause.

STOKES V. ROBERTSON,

State Revenue Agent,

By MAYES & MAYES,

Att'ys.

(Endorsements on Back :) No. 4228. Wirt Adams, Rev. Agt., vs. 1st Nat'l Bank. Petition for Appeal. Filed Jan. 6th, 1916. A. J. Ramsey, Jr., Clerk.

Summons to Supreme Court from Circuit Court.

The State of Mississippi to the Sheriff of Harrison County, in said State:

You are hereby commanded to summon The First National Bank of Gulfport, Appellee, or Griffith and Wallace, its Attorneys in fact or of record, if to be found in Your County, to appear before the Supreme Court of the State of Mississippi, at the Capitol in the city of Jackson, in the County of Hinds and State aforesaid, on the first Monday of March, A. D. 1917, then and there to answer the appeal of Wirt Adams, State Revenue Agent, from a judgment of the Circuit Court of Harrison County in said State rendered against said Appellant on the 6th day of December, A. D. 1916, at the November Term, A. D. 1916, of said Circuit Court in favor of said Appellee, by affirming the decision of the Board of Supervisors and have there and then this writ.

Given under my hand and seal of said Circuit Court at my office in Gulfport, Miss., and issued this the 1st day of February, A. D. 1917.

A. J. RAMSEY, JR.,

Circuit Clerk,

[SEAL.]

By E. McMANUS, D. C.

49

Sheriff's Return.

I have this day executed this writ personally by delivering to V. A. Griffith, Attorney of the firm of Griffith and Wallace, attorneys of record for the within named The First National Bank of Gulfport, a true copy of this writ.

This the 2nd day of February, 1917.

J. B. CLARK,

Sheriff,

By C. W. FULMER, D. S.

Certificate of Clerk.

THE STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsey, Jr., Clerk of the Circuit Court of said County and State do hereby certify that the foregoing 7 pages contain a full, true, correct and complete copy of the Caption, Plea, Demurrer to Plea, Judgment, Petition for Appeal and Summons, being all of and the entire record to be transcribed, as per Petition herein, in the case styled Wirt Adams, State Revenue Agent, Plaintiff, vs. The First National Bank of Gulfport, defendant, numbered 4228 on the General (Civil) Docket of said Court, which includes the judgment appealed from, as the same appear of record and remain on file in my office.

Given under my hand and official seal, this the 2nd day of February, A. D. 1917.

A. J. RAMSEY, JR.,
Circuit Clerk Harrison County, Mississippi,
 By E. McMANUS, D. C.

Statement of Fees.

To A. J. Ramsey, Jr., Circuit Clerk.

Transcript Fee, binding fee, certificate, etc., \$3.40.

To J. B. Clark, Sheriff:

Executing Summons and Return, \$2.00.

Which amounts have not been paid.

A. J. RAMSEY, JR.,
Circuit Clerk,
 By E. McMANUS, D. C.

50 Endorsement on Back: No. 19,703. Second District. Circuit Court Harrison County. Wirt Adams, State Revenue Agent. Record No. —. First National Bank of Gulfport. Filed Feby. 7th, 1917. Geo. C. Myers, Clerk, March Term, 1917.

51 *Organization of Supreme Court.*

October Term, 1917.

Minutes Supreme Court of Mississippi, October Term, 1917.

(M. B. T., page 594.)

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of the State of Mississippi Begun and Held at

the Court Room at the Capitol, in the City of Jackson, on the Second Monday, Being the 8th Day of October, 1917.

Present: The Honorable Sydney Smith, Chief Justice, the Honorable Sam C. Cook, the Honorable J. Morgan Stevens, the Hon. J. B. Holden, the Honorable Eugene O. Sykes, and the Honorable Geo. H. Ethridge, Associate Justices; Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Submission on Merits.

Minutes Supreme Court of Mississippi, October Term, 1917, Monday, November 5th, 1917.

No. 19703.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

Submitted on briefs by Mize & Mize and Mayes & Mayes for Appellant and Griffith and Wallace for Appellee.

Judgment of Court.

Minutes of Supreme Court of Mississippi, October Term, 1917, Monday, January 14th, 1918.

No. 19703.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Harrison County and this court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause
52 at the November Term, 1916, on the 6th day of December, 1919, be and the same is hereby reversed and this cause remanded and that appellee do pay the costs of this appeal to be taxed, etc.

Opinion.

Supreme Court of the State of Mississippi, Division A.

Smith, C. J.

No. 19,703.

WIRT ADAMS, State Revenue Agent,

vs.

THE FIRST NATIONAL BANK OF GULFPORT.

(5459.)

This is a proceeding in which the Revenue Agent is attempting to back assess the shares of appellee's capital stock together with the accumulations thereon for the years 1902 to 1907, inclusive, during which it is alleged that these shares have escaped taxation. Appellee is a National Bank and claims, and the Court below held, that the tax is imposed against it upon its capital stock as such, which the State is without power to do. It is true that a National Bank is not subject to taxation upon its capital stock by the State or any subdivision thereof, but the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof, may be taxed under the provisions of U. S. Revised Statutes, Sec. 5219, and the taxes imposed thereon may be collected in the first instance from the bank itself "as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax *wa* paid from the shareholders." *Home Savings Bank vs. Des Moines*, 51 L. Ed. at page 910; *First National Bank v. McNeill*, 238 Fed. 559, and such is the object sought to be accomplished by the Statute by which the tax here sought to be collected is imposed. *Bank v. Oxford*, 70 Miss. 504; Constitution, Sec. 181; Code of 1906, Sec. 4273; Hemingway's Code, Sec. 6907. That the statute makes no provision for a recovery by the bank from its shareholders for the taxes paid by it pursuant thereto is not material

53 for the reason that such recovery may be had "under the general principle of law that one who pays the debt of another at his request, can recover the amount from him." *Home Savings Bank v. Des Moines*, supra.

Reversed and Remanded.

Endorsed: Filed January 21st, 1918. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

Order Granting 15 Days' Additional Time to File Suggestion of Error.

Minutes Supreme Court of Mississippi, October Term, 1917, Tuesday,
January 15th, 1918.

No. 19703.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

Ordered: That fifteen days' additional time be allowed in which to file suggestion of error herein.

54

Suggestion of Error, Supreme Court of Miss.

In the Supreme Court of Mississippi.

No. 19703.

WIRT ADAMS, State Revenue Agent, Appellant,

vs.

FIRST NATIONAL BANK OF GULFPORT, Appellee.

With due deference to the Court, we are respectfully constrained to present the harm that the Appellee will suffer as the result of the decision of the court in this cause, and we invite the further consideration of the court on the questions involved in this case.

The appellee in this case is a national bank organized and existing under the laws of the United States. This proceeding was begun by the State Revenue Agent to collect from the bank itself on notice of an assessment on the capital stock and surplus of the bank which he sought to have the board of supervisors of Harrison County assess directly against the bank itself and not against the individual share holders of the bank. The board of supervisors declined to make the assessment and the State Revenue Agent appealed to the Circuit Court where a decision was rendered adversely to the position taken by the Revenue Agent.

This court in rendering its recent decision holds that the shares into which the capital and surplus of a bank is divided is the property of the shareholder and should be assessed to the shareholder and not to the bank, as authorized by Section 5219, United States Compiled Statutes. The ruling of the court in this case, however, will permit the State Revenue Agent to collect on an assessment directly against the bank the capital and surplus, and the court bases its holdings solely and exclusively upon an implied obligation on the part of the shareholders to refund to the bank the amount so

to be paid by the bank as back taxes assessed against itself on the capital and surplus of the bank. For authority for thus holding, the court relies upon the

55 Home Savings Bank vs. Des Moines, 205 U. S., 503, 51 L. Ed., 910;

First National Bank vs. McNeil, 238 Fed. 559, and
The Bank vs. Oxford, 70 Miss., 504.

We suggest to the court that the case of The Bank vs. Oxford is no authority in this case, for the reason that that case was decided prior to the adoption of the Constitution of 1890, and the present Constitution provided a different method for the taxation of banks from that existing prior to our present Constitution.

The Circuit Court of Appeals in the case of the First National Bank vs. McNeil merely adopted and followed the decision of the Supreme Court of this State in the Bank vs. Oxford case, without adding any new reasoning for their position or citing any additional authority. The Circuit Court of Appeals felt constrained to follow the decision of the Supreme Court of this State in construing its own statute, but, as already observed, we do not think this court or the Circuit Court of Appeals should have followed the holdings in the Bank vs. Oxford case, for the reason that the decision was rendered prior to the adoption of the present Constitution. The conclusion of this court might have been different if a national bank had been involved in that case instead of a state bank.

If this court places chief reliance for its holding in this case on the case of Home Savings Bank vs. Des Moines, 205 U. S., 503, we call the court's attention to the fact that it was a state bank involved in that case, and we call the special attention of the court to the fact that there was an express and specific Iowa state statute that empowered the taxing authorities of that state to collect from the bank the amount of the taxes due by the shareholders, and granted unto the bank or corporation so paying the taxes a specific and express

lien for the amount so paid.

56 Section 1322 of the Iowa State Statutes provides that shares of stock of a national bank shall be assessed to the individual stock-holders at the place where the bank is located.

Section 1325 of the Iowa State Statutes reads as follows:

"The corporation described in the preceding sections shall be liable for the payment of the taxes assessed to the stock-holders of such corporation, or such taxes shall be payable by the corporation in the same manner and under the same penalty as in the case of taxes due from an individual tax payer and may be collected in the same manner as other taxes, or by an action in the name of the county. Such corporation may recover from each stock-holder its proportion of the taxes so paid and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such taxes, the corporation may enforce its lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stock-

holders thirty days' notice of the amount of such tax, and the time and place for sale, etc."

This court admits that there is no Mississippi statute that makes provision for a recovery by a bank from its share holders for taxes paid out by it, for the reason that such recovery may be had "under the general principle of law that one who pays the debt of another at his request can recover the amount from him."

We call the court's attention to the fact that the record does not disclose there was ever any request made of the share holders that the bank pay this tax. The taxes have not yet been paid and the Appellee in this case is assuming the position that no request will
57 be made by the shareholders that it pay the taxes, and taking the further position that unless there is an express request for it to do so, it will be without any right of action to recover the amount so paid from the respective shareholders.

In every case that we have found that requires the bank to pay the taxes assessed against the shareholders, it specifically provides that the bank has a lien on the dividends or shares of stock for the amount so paid; and in the absence of a statute creating a lien in favor of the bank on the shares of stock for the amount of taxes paid, and in the absence of a request from the shareholders to pay the taxes, the bank has neither a lien on the shares of stock nor a right of action against the share holder to recover the same on an implied obligation.

We also wish to call the court's attention to the fact that the precise and only question involved in the case of Home Savings Bank vs. Des Moines, was the question of immunity of national security from state taxation. The Bank owned United States Government bonds and the taxing authorities were making an effort to collect taxes on the value of the securities, or rather the taxing authorities refused in making the assessment against the share holders to allow him any deduction for the amount of the capital stock of the bank invested in United States bonds. The court in this case held that the efforts of the taxing authorities were in violation of the provision of the Federal Constitution which prohibits any form of taxation to be imposed by any state, or prohibits any state, to impose any burden upon any part of the national public debt.

The Supreme Court of the United States held in the Des Moines case, that neither the state nor the city of Des Moines had any authority to impose any burden upon that portion of the capital of the bank invested in the national public debt.

58 If the Supreme Court held in the Des Moines case that "under the general principle of law that one who pays the debt of another at his request can recover the amount from him," it was obiter dicta, as that point was not involved in the case. In that case, however, the court does refer to the fact that, corporations (Sec. 1325 Iowa State Statute) are made liable to pay the taxes which may be imposed and are secured by a lien on the shares of stock dividends which may be enforced by a sale thereof.

We will call the court's attention to the fact that in the instant

case, the State Revenue Agent is not attempting to assess any portion of the capital, surplus or undivided profits to the shareholders, as the United States statute explicitly provides, as well as our state statutes, but the assessment is attempted to be made directly against the bank, which is expressly forbidden. The state can only tax national banks through the permission of the Acts of Congress. As this is not an attempt to assess any portion of the capital or surplus to the shareholder, the bank would not have any right to recover from the shareholders the amount it paid out on taxes, upon the theory of an implied obligation of the shareholders to reimburse it for two reasons:

1st. The shareholders have not requested the bank to pay it; and

2nd. The taxes are not sought to be assessed against the shareholders but directly against the bank, and if the bank pays it, even under a mandate of court, it will pay it at its own peril, for the reason that a decision in this case will not be binding upon the shareholders because they are not made parties hereto.

There is an unbroken line of decisions of the Federal courts that a national bank is not permitted in making its income reports to the Government to deduct from its earnings the amount of taxes paid by it on its capital and surplus. This precise point is involved in the case of

Elliott National Bank vs. Gill, Internal Revenue Collector,
210 Fed. 933.

The State of Massachusetts enacted a statute assessing the capital and surplus of a national bank to the shareholders but requiring the banks to pay the taxes, giving to the banks a specific lien upon the shares of stock and the dividends, and providing for the sale thereof if the shareholder did not reimburse the bank.

I also call the court's attention to the case of National Bank of Commerce vs. Allen, 211 Fed. 743. This is a Missouri case. Statute No. 11357 of that state provides for the assessment of the shares of banks incorporated under the laws of the United States to the shareholders thereof.

Missouri statute No. 11,359 provided that the taxes assessed on the shares of stock should be paid by the corporation and that the bank so paying the taxes could recover the same from the owners of the shares, the amount thereof being a lien on the shares of the respective shareholders; and that before the shareholder could legally transfer and sell his shares of stock, that the taxes had to be paid.

In each and every case where the bank is compelled to pay the taxes of the shareholder, there is a statute giving the bank a lien on the stock for the amount so paid; and in some of the states, the sale of the stock is forbidden until the taxes so paid by the bank for shareholder- are paid by the respective shareholders. Even where the statutes do not prohibit the sale of the stock until after the shareholder has reimbursed the bank the amount of taxes paid for him,

it expressly creates a lien on the stock and by creating a lien by express statute is paramount to forbidding the sale and transfer
60 of the stock until the shareholder has repaid the bank the amount of the taxes paid by him for it.

If the appellee in this case was required to pay the taxes attempted to be assessed against it for the years 1902 to 1907, it can't acquire a lien on the shares of stock of the respective shareholders, and it can't sue the present shareholders on an implied contract, for the reason that the shareholders have not requested the bank to pay it. No notice has been served upon them by the State Revenue Agent of his intention to assess the shareholder, but the State Revenue Agent is proceeding directly against the bank itself, and attempting to collect from it taxes on certain of its capital and surplus which he says has escaped taxation for the years 1902 and 1907. This proceeding cannot be notice to the shareholders because the State Revenue Agent is not attempting to assess it against the shareholders, but is proceeding directly against the Bank, and if the bank pays it, it will have no right to recover from the shareholder, and at the same time will not have the right to claim as a credit or expense item in making its report to the Federal Government of its income tax.

Northern Trust Co. vs. McCoach, 215 Fed., 991.

Elliott National Bank vs. Gill, 210 Fed., 933.

National Bank of Commerce vs. Allen, 217 Fed., 743.

Even if the bank had the right "under the general principle of law that one who pays the debt of another at his request can recover the amount from him," the bank in all probability would not be in a position to recover from the shareholder in this case, for the reason that many of the individuals who held shares of stock in the Appellee between the years 1902 and 1907 are not now shareholders of the bank. The court will take judicial knowledge of the fact that shares of stock are commodities of commerce, and change hands

61 from year to year, and it can well be presumed as a matter of fact that the shareholders in the First National Bank in the year 1916 are different from those of the year 1918. In reaching the conclusion that the court did in this case in rendering its opinion herein, it must have presumed that the shareholders of the First National Bank are now identical with those during the years for which the Revenue Agent is attempting to collect taxes on the surplus of the bank that escaped taxation. There is nothing in the record to show that the share holders are the same, and we do not presume that it would be improper for us to state in this Suggestion of Error that the shareholders in the First National Bank now are entirely different from the share holders seven or ten years ago.

This proceeding was instituted several years ago and the Revenue Agent is attempting to assess the bank on its surplus, which he alleges escaped taxation all the way from seven to nine years ago.

The State of Mississippi has not enacted any statute giving the

bank a lien on the shares of stock for the amount of taxes paid by any bank. Neither is the holder of any stock anywhere between 1902 and 1909 under any implied contract to re-pay the bank any taxes that the bank may now voluntarily pay for such shareholder on the shares of stock then held by such shareholder. In the absence of a lien, and in the absence of such a contract, it clearly occurs to us that a person who now owns shares of stock who did not own the shares during the years 1902 to 1909, could not be compelled by the bank to pay any portion of the taxes that accrued against any shareholder during those years. If it is true that the bank could not now require the present shareholders to reimburse it for taxes it might be required to pay in this proceeding for taxes that accrued against the shareholders in the years 1902 to 1909, then the requirement of the bank itself to pay such taxes
 62 would undoubtedly be a direct tax against the bank itself upon its capital and surplus, which is expressly and specifically forbidden by the Acts of Congress.

Some of the persons who held shares between the years 1902 and 1909 have become deceased; their estates have been wound up; and others have long since disposed of their shares of stock; and if this decision of the court holds, the bank itself will be forced to pay out of its own funds the taxes attempted to be collected from it in this cause without any possible hope of reimbursement, as the Legislature has not created any lien on the shares of stock for the taxes accrued or to be accrued. Such lien cannot be created by a judgment of this court in a proceeding of this character, nor can this court by any decision create any obligation, implied or otherwise, upon any person or former shareholder to pay the taxes attempted to be collected from the bank in this proceeding.

We have heretofore referred to the fact that not a single shareholder of the bank has requested the bank to pay this tax, and the shareholders haven't even any notice of an attempt of the Revenue Agent to collect it. Some of the shareholders are dead; and in fact some of the holders of the largest number of shares are dead; and certainly the principle of implied contract or implied obligation could not be stretched now to make their estates liable to the bank for any taxes it might now allege to be due for years long past. Others have sold their stock during the last nine years, some of whom may be insolvent, and more than likely their present place of abode wholly unknown.

Even conceding for the sake of argument that the bank could recover from the shareholders the amount of taxes as it might be compelled to pay in this proceeding on the theory that the payment of the taxes by the bank is equivalent to the payment thereof by the
 63 respective shareholders, that position cannot be maintained for the reason that such a position has been expressly repudiated by the Supreme Court of the United States, rendered in the case of *Owensboro National Bank vs. Owensboro*, 173 U. S.
 664.

This court based its decision upon the announcement to the court in the *Home Savings Bank vs. Des Moines* case, but in that decision

itself it refers to and quotes with approval the opinion of Mr. Justice White, now Chief Justice, delivered in the case of Owensboro National Bank vs. Owensboro. We quote from that decision as follows:

"To be equivalent in law involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. * * * If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. * * * The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held invalid, does not strike us as worthy of consideration."

64

In the case of

Judy, County Treasurer vs. National State Bank of
Mount Pleasant, Iowa, 110 N. W. Rep. 605,

the Iowa State Supreme Court held that under Section 1322 of the Code, shares in national banks shall be assessed to the individual stockholders, and the bank cannot be assessed therefor.

The proceeding instituted in this case is a direct effort on the part of the State Revenue Agent to assess some of the capital or surplus of the bank direct to the bank itself and no attempt whatever is made to assess either the surplus or any portion of the capital stock to the respective shareholders.

It seems that there is no proposition in law more clearly settled either by express Federal statute or by uniform decisions of the Supreme Court of the United States, the Circuit Court of Appeals, or the Supreme Courts of the various States, than the proposition that the capital and surplus of a national bank must be assessed to the shareholder.

We respectfully and earnestly present to the court the view that if the bank is required to pay the taxes attempted to be assessed against it in this proceeding by the State Revenue Agent to cover any portion of the years from 1902 to 1909, — is a direct attempt to assess the capital or surplus of a bank direct against the bank itself in violation of the Federal statute, and the proceeding is void.

In the next place, that if the bank is required to pay the taxes attempted to be assessed directly against it, it will be without any recourse to collect the same from the present or former shareholders, for the reason that neither the past nor the present shareholders have

requested the bank to pay it; and for the further reason that many of the shareholders who owned shares seven years ago, during the years for which the Revenue Agent in this case is attempting to collect the same, are dead; and many other shareholders during
65 that period have long since sold and transferred their shares:

That if the bank is required to pay these taxes now, it will be equivalent to taking its property without due process of law:

That if the State Revenue Agent has any right to recover taxes on that part of the capital stock or surplus of the Appellee for any of the years 1902 to 1909, his sole and only remedy is to assess it against the person who was a shareholder at that time.

Respectfully submitted,

HANUN GARDNER,
GRIFFITH & WALLACE,
Attorneys for Appellee.

I, Hanun Gardner, one of the Attorneys for Appellee, hereby certify that I have this day delivered to Counsel for Appellant a copy of the above and foregoing Suggestion of Error.

This 13th day of February, 1918.

Attorney for Appellee.

Endorsed on Back: Received and Filed Feb. 14, 1918. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

Order Overruling Sug. of Error.

Minutes Supreme Court of Mississippi, October Term, 1917, Monday
February 25th, 1918.

No. 19703.

WIRT ADAMS, State Revenue Agent,

vs.

FIRST NATIONAL BANK OF GULFPORT.

Suggestion of Error Overruled.

66 I, W. J. Buck, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State, which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of all the papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of First National Bank of Gulfport vs. Wirt Adams Revenue Agent, being two appeals numbered respectively 21035 and 19703 on the docket of said court all of which are now on file in my office, and taken together constitute the record in said cause.

Given under my hand and the seal of said Court affixed at office in the City of Jackson, Mississippi, this the 27th day of August, A. D. 1920.

[Seal Supreme Court, State of Mississippi.]

W. J. BUCK,
Clerk of the Supreme Court of Mississippi.

Statement of Costs due W. J. Buck, Clerk of Supreme Court, which have been paid by the First National Bank of Gulfport:

Transcript, 21,000 words, at 15 cets per hundred.....	\$31.50
Index50
Certificate50
	<hr/>
	\$32.50

67 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Being informed that there is now pending before you a suit in which First National Bank of Gulfport is appellant, and Wirt Adams, State Revenue Agent, is appellee, No. 21,035, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Harrison County, and we, being willing for certain reasons that the said cause and the record and proceedings

therein should be certified by the said Supreme Court, and
68 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

69 [Endorsed:] File No. 27,898. Supreme Court of the United States, October Term, 1920. No. 541. The First National Bank of Gulfport, Mississippi, vs. Wirt Adams, revenue agent of the State of Mississippi. Writ of certiorari.

STATE OF MISSISSIPPI,

Hinds County:

In answer to the above certiorari I attach certified copy of agreement filed in the Supreme Court of the State of Mississippi, Nov. 6th, 1920.

Given under my hand and the seal of said court at offices in the Capitol in the City of Jackson this the 6th day of November, 1920.

[Seal of Supreme Court, State of Mississippi.]

W. J. BUCK,

Clerk of the Supreme Court of Mississippi.

No. 21,035.

FIRST NATIONAL BANK OF GULFPORT

v.

WIRT ADAMS, State Revenue Agent.

Whereas, the appellant in the above styled cause made application to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Mississippi for a review of the Federal question involved in said controversy, and;

Whereas, upon the 27th day of October, 1920, the Honorable Supreme Court of the United States issued a writ of certiorari to the Supreme Court of the State of Mississippi, requiring the record in said cause to be certified by the said Supreme Court of the State of Mississippi and removed to the Supreme Court of the United States, and;

Whereas, there has already been filed with the Clerk of the Supreme Court of the United States, on the application for the writ of certiorari in said cause, a true and correct copy of the record and proceedings had and done by the Supreme Court of the State of Mississippi in said cause, duly certified by the Clerk of the Supreme Court of the State of Mississippi, now;

Therefore, it is understood and agreed that the certified copy of the record and proceedings had in such cause by the Supreme Court of the State of Mississippi, certified by the Clerk of the Supreme Court of the State of Mississippi, now on file with the Clerk of the Supreme Court of the United States, may be taken and treated as a return to the said writ of certiorari, and as a full and complete compliance of the requirements thereof.

Signed this the 1 day of November, 1920.

WM. H. WATKINS,

Attorney for Plaintiff in Error.

J. H. MIZE,

Attorney for Defendant in Error.

I, W. J. Buck, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the attached is a true and correct copy filed in the Supreme Court of Mississippi on November 6th, 1920, of an agreement by the attorneys in cause No. 21,035—First National Bank of Gulfport vs. Wirt Adams, State Revenue Agent, that the transcript filed in the Supreme Court of the United States with the application for a writ of certiorari in the Supreme Court of the United States may be taken and treated as a return to the writ of

certiorari and as a full and complete compliance of the requirements thereof.

Given under my hand and the seal of said court at offices in the Capitol in the City of Jackson, Mississippi, this the 6th day of November, 1920.

[Seal of Supreme Court, State of Mississippi.]

W. J. BUCK,

Clerk of the Supreme Court of Mississippi.

[Endorsed:] 541—27,898.

72 [Endorsed:] File No. 27,898. Supreme Court, U. S.,
October Term, 1920. Term No. 541. The First National
Bank of Gulfport, Mississippi, petitioner, vs. Wirt Adams, revenue
agent, etc. Writ of certiorari and return. Filed Nov. 9, 1920.

(3047)

1. The first of these is the fact that the patient is not a native-born American.

2. The second is the fact that the patient is a member of one of the so-called "inferior races."

3. The third is the fact that the patient is a member of one of the so-called "inferior classes."

4. The fourth is the fact that the patient is a member of one of the so-called "inferior professions."

5. The fifth is the fact that the patient is a member of one of the so-called "inferior occupations."

6. The sixth is the fact that the patient is a member of one of the so-called "inferior social classes."

7. The seventh is the fact that the patient is a member of one of the so-called "inferior religious groups."

8. The eighth is the fact that the patient is a member of one of the so-called "inferior political parties."

9. The ninth is the fact that the patient is a member of one of the so-called "inferior ethnic groups."

10. The tenth is the fact that the patient is a member of one of the so-called "inferior cultural groups."

11. The eleventh is the fact that the patient is a member of one of the so-called "inferior intellectual groups."

12. The twelfth is the fact that the patient is a member of one of the so-called "inferior artistic groups."

13. The thirteenth is the fact that the patient is a member of one of the so-called "inferior scientific groups."

14. The fourteenth is the fact that the patient is a member of one of the so-called "inferior literary groups."

15. The fifteenth is the fact that the patient is a member of one of the so-called "inferior musical groups."

16. The sixteenth is the fact that the patient is a member of one of the so-called "inferior dramatic groups."

17. The seventeenth is the fact that the patient is a member of one of the so-called "inferior theatrical groups."

18. The eighteenth is the fact that the patient is a member of one of the so-called "inferior sporting groups."

19. The nineteenth is the fact that the patient is a member of one of the so-called "inferior gaming groups."

20. The twentieth is the fact that the patient is a member of one of the so-called "inferior gambling groups."

21. The twenty-first is the fact that the patient is a member of one of the so-called "inferior drinking groups."

22. The twenty-second is the fact that the patient is a member of one of the so-called "inferior smoking groups."

23. The twenty-third is the fact that the patient is a member of one of the so-called "inferior eating groups."

24. The twenty-fourth is the fact that the patient is a member of one of the so-called "inferior sleeping groups."

25. The twenty-fifth is the fact that the patient is a member of one of the so-called "inferior bathing groups."

26. The twenty-sixth is the fact that the patient is a member of one of the so-called "inferior dressing groups."

27. The twenty-seventh is the fact that the patient is a member of one of the so-called "inferior undressing groups."

28. The twenty-eighth is the fact that the patient is a member of one of the so-called "inferior walking groups."

29. The twenty-ninth is the fact that the patient is a member of one of the so-called "inferior running groups."

30. The thirtieth is the fact that the patient is a member of one of the so-called "inferior jumping groups."

Office Supreme Court, U. S.

FILED

FEB 27 1922

WM. R. STANSBURY

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 136.

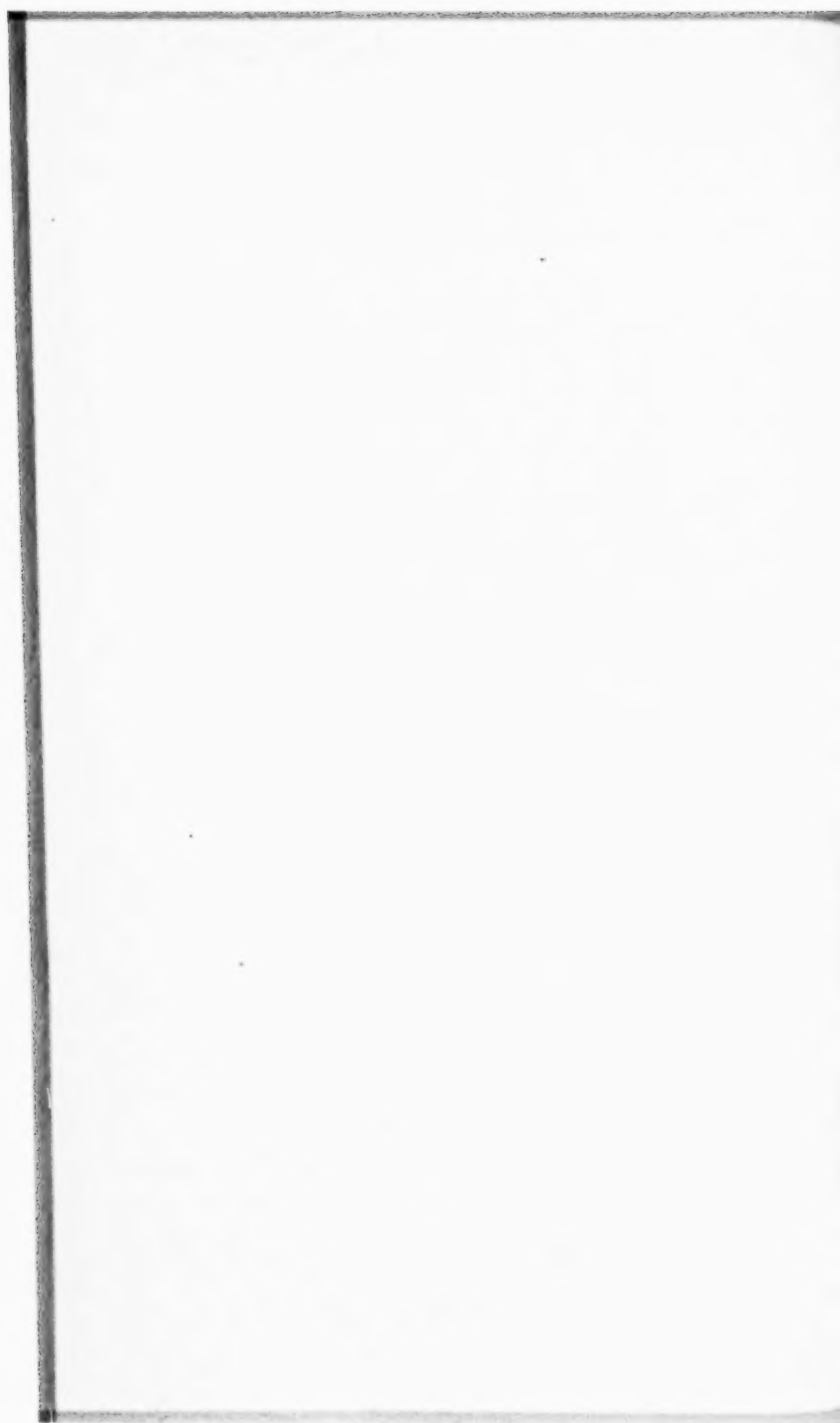
FIRST NATIONAL BANK OF GULFPORT, MISSIS-
SIPPI, Plaintiff in Error,

vs.

WIRT ADAMS, REVENUE AGENT OF THE STATE
OF MISSISSIPPI, Defendant in Error.

ASSIGNMENT OF ERROR

W. H. WATKINS,
Attorney for Plaintiff in Error



In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 136.

**FIRST NATIONAL BANK OF GULFPORT, MISSIS-
SIPPI, Plaintiff in Error,**

vs.

**WIRT ADAMS, REVENUE AGENT OF THE STATE
OF MISSISSIPPI, Defendant in Error.**

ASSIGNMENT OF ERROR.

Comes the First National Bank of Gulfport, Mississippi, and, complaining of a certain judgment rendered against it by the Supreme Court of the State of Mississippi on the 14th day of June, 1920, assigns the following error:

1. The Supreme Court of the State of Mississippi committed error in affirming the judgment of the Circuit Court of Harrison County, Mississippi, which last mentioned Court rendered a judgment making an assessment against the property of plaintiff in error.

2. The Supreme Court of the State of Mississippi committed error in holding that the assessment in question was one against the share holders of the plaintiff in error bank and not against the bank, the record affirmatively showing that the assessment involved was one made directly against the plaintiff in error bank, and not against its shareholders.

3. The Supreme Court of the State of Mississippi committed error in affirming an assessment made by the Circuit Court of Harrison County, Mississippi, against the property of the plaintiff in error bank, which assessment was in violation of the statutes of the United States in respect to the assessment of national banks.

4. The Supreme Court of the State of Mississippi committed error in failing and refusing to reverse the judgment of the Circuit Court of Harrison County, Mississippi, making and affirming an assessment against the property of plaintiff in error bank, which assessment was in violation of the statutes of the United States.

5. The Supreme Court of the State of Mississippi committed error in failing and refusing to render a judgment in favor of plaintiff in error bank and against the defendant in error, the Revenue Agent of the State of Mississippi.

6. The Supreme Court of the State of Mississippi committed error in holding that the plea of plaintiff in error alleging a discrimination in taxation against it as between it and other moneyed capital in the State of Mississippi, in violation of the United States statutes in respect thereto, was insufficient for such purpose.

7. The Supreme Court of the State of Mississippi committed error in affirming the judgment of the Circuit Court of Harrison County, Mississippi, against it in whole and in part.

8. The record affirmatively discloses not only that the property of plaintiff in error was assessed directly to it, in violation of the statutes of the United States in respect to the taxation of National Banks, but that it was discriminated against in that a larger burden of taxation was cast upon it than was properly assessable against other moneyed capital in the State of Mississippi, which was in violation of the United States statutes in respect

to the taxation of National Banks, and the Supreme Court of the State of Mississippi committed error in sustaining the same.

9. Other causes to be shown at the hearing.

Wherefore, plaintiff in error prays that the judgment of the Supreme Court of the State of Mississippi be reversed, and that this cause be remanded to be proceeded with in accordance with the opinion of this Court.

W. H. Watkins.
W. H. WATKINS,

Attorney for Plaintiff in Error.

SEP 11 1920

JAMES D. MAHER,

CLERK

NO. **136**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

**THE FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI,**

PETITIONER,

V.

**WIRT ADAMS, REVENUE AGENT OF THE STATE
OF MISSISSIPPI,**

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT OF PETITION**

**WM. H. WATKINS,
ATTORNEY FOR PETITIONER.**

**HANUN GARDNER,
GRIFFITH & WALLACE,
OF COUNSEL.**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

**THE FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI,**

PETITIONER,

V.

No.....

**WIRT ADAMS, REVENUE AGENT OF THE STATE
OF MISSISSIPPI,**

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

**TO THE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:**

(1) The petitioner, the First National Bank of Gulfport, Mississippi, is a corporation chartered under the acts of the Congress of the United States, domiciled at Gulfport, Harrison County, Mississippi.

(2) Section 4737 of the Mississippi Code of 1906, being Section 7055 of Hemingway's Code of the State of Mississippi, provides for the creation of the office of State Revenue Agent. The section is in the following language:

“There shall be a state revenue agent, who shall be elected at the general election in the same manner that other state officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified.”

Section 4740 of the Mississippi Code of 1906, being Section 7058 of Hemingway's Code of the State of Mississippi, provides a system for back assessing property escaping taxation. The section is as follows:

“After the expiration of the fiscal year in which taxes become due, should the revenue agent discover that any person, corporation, property, business, occupation or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the tax-collector shall, within ten days thereafter, make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment, and the state revenue agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by Section 7006, and if it be personalty, the tax-collector shall proceed to collect by distress or otherwise. If the tax-collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped

taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the revenue agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections."

Sections 4273, 4274 and 4275 of the Mississippi Code of 1906, being Sections 6907, 6908 and 6909 of Hemingway's Code of the State of Mississippi, provide for the assessment of banks, such sections being as follows:

"The president, cashier or other officer having like duties, of each bank or banking association in this state, whether existing by the laws of this state or of the United States, shall deliver to the assessor of taxes of the county in which it is located, a written statement, on or before the first day of May in each year, under oath, of the number and amount of all the shares of its capital stock paid in, or if it be not a corporation or joint-stock company, then the amount of its capital, and of the sum of all undivided profits, or surplus or accumulation of any sort constituting part of the assets of the bank and not including its real estate, and the value of such shares estimated at par and increased by the proportion of the par value of all the shares of the stock to the said surplus fund or accumulation, or of the amount of its capital so increased, shall be the basis of the taxation of such shares to the holder or of the capital to the owner thereof; but if the shares of such bank or association are of less value than par, they shall be valued accordingly."

“Every bank or banking association shall, on or before the first day of December in each year, pay to the collector of taxes in the county in which such bank or association is located, the amount of state and county taxes due by the assessment, which shall be the per centum levied for the state and county severally on the value of property, real and personal; and, for any failure to pay such taxes, its assets shall be liable to be proceeded against and dealt with as provided by law in other cases for failure to pay taxes.”

“The real estate of a bank or banking association shall be assessed and pay taxes—state, county or municipal—according to its value, as other real estate.”

There were no other statutes in force in the State of Mississippi at the time this litigation arose providing for the assessment of banks.

Upon the 28th day of July, 1908, the respondent, as revenue agent of the State of Mississippi, acting under Section 4740 of the Mississippi Code of 1906, hereinbefore set out, gave notice to the tax-collector of Harrison County, Mississippi, to assess the property of petitioner by way of additional assessment for the years 1903, 1904, 1905, 1906 and 1907; the notice being as follows, the same being found Transcript page 16:

“To the Tax-Collector of Harrison County, Mississippi:

“You will take notice, and you are hereby notified, that the following described property, in said county, to-wit, capital stock, surplus, undivided profits and any and all other property properly assessable to banks, amounting to \$75,150.00, belonging to and owned by First National Bank of Gulfport, has escaped taxation during each of the years 1902, 1903, 1904, 1905, 1906, and 1907. By reason of not being assessed.

“You are by virtue of the Annotated Code of Mississippi of 1906, Chapter 131, Section 4740, now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment, on the roll or tax list in your hands, and to give ten days notice in writing to said First National Bank whose property is so assessed, and also notify in writing the Board of Supervisors of said county, of said assessment.

“Herein fail not, under penalties imposed by said Code.

“Witness my signature, this the 29th day of July, 1908.

“WIRT ADAMS, State Revenue Agent,

“By Alfred D. Galloway, Deputy.”

“I have this day executed the within writ, personally by delivering to the First National Bank, by handing to W. A. King, Vice-President of the said First National Bank, a true copy of this writ, this the 30th day of July, A. D. 1908.

WM. REEVES, JR., Sheriff,

By F. L. Patenotte, D. S.”

The sheriff and tax-collector, in accordance with the statute, made the assessment on the rolls in his office, the assessment being in words and figures as follows:

“Amount of all other personal property not otherwise mentioned, \$174,000.00.”

The assessment came on for hearing by the Board of Supervisors of the county for confirmation, and the same was disallowed by such board. Appeal was had to the Circuit Court of Harrison County, Mississippi, and the disapproval of the assessment affirmed by the Board of Supervisors.

Appeal was then had to the Supreme Court of the

State of Mississippi, and the cause was reversed by that court, the case being reported, *Adams, State Revenue Agent v. People's Bank of Biloxi et al.*, 66 South. 407, 108 Miss., 346.

It will not be necessary to set the opinion out herein, because the federal questions hereinafter shown were not raised at that time.

(3) The case was remanded to the Circuit Court of Harrison County, Mississippi, in which court, the petitioner filed a special plea, wherein it was alleged that the petitioner was a national bank, organized and chartered under the acts of the Congress of the United States, and that the proceeding in question was an assessment against the assets and property of the bank itself, and not against its shareholders, and that under the acts of Congress, it was not liable to taxation, and its property and assets could not be assessed for taxation and taxed, the said plea being found, Tr. page 44-45.

To which plea, the respondent demurred on the ground that the plea was insufficient in law, Tr. page 46, which demurrer was by the trial court overruled on the ground that the attempted assessment was not an assessment against the stockholders of the bank, but was an assessment and attempt to tax directly the property of the bank itself; and the trial court thereupon affirmed the action of the Board of Supervisors in refusing to approve the tax. Tr. page 47.

An appeal was then had to the Supreme Court of the State of Mississippi, and the Supreme Court of the State of Mississippi reversed the decision of the Circuit Court of Harrison County, Mississippi, upon the 14th day of January, 1918. Its decision will be found reported, *Adams, State Revenue Agent v. First National Bank of Gulfport, Miss.*, 77 South., 195, 116 Miss., 450; said decision being as follows.

“This is a proceeding in which the revenue agent is attempting to back-assess the shares of appellee’s capital stock, together with the accumulations thereon, for the years 1902 to 1907, inclusive, during which it is alleged that these shares have escaped taxation. Appellee is a national bank, and claims, and the court below held, that the tax is imposed against it upon its capital stock as such, which the state is without power to do. It is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof, but the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof, may be taxed under the provisions of U. S. Revised Statutes, Section 5219, (U. S. Comp. St. 1916, Section 9784), and the taxes imposed thereon may be collected in the first instance from the bank itself, ‘as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid from the shareholders.’ (Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed., 910; First National Bank v. McNeel, 238 Fed., 559, 151 C. C. A. 495); and such is the object sought to be accomplished by the statute by which the tax here sought to be collected is imposed. (Bank v. Oxford, 70 Miss., 501, 12 So., 203; Constitution, Section 181; Code of 1906, Section 4237; Hemingway’s Code, Section 6970). That the statute makes no provision for a recovery by the bank from its shareholders for the taxes paid by it pursuant thereto is not material, for the reason that such recovery may be had ‘under the general principles of law that one who pays the debts of another, at his request, can recover the amount from him.’ Home Savings Bank v. Des Moines, supra.”

The judgment and opinion of the court will be found Tr. 51-52.

Counsel for petitioner filed an elaborate suggestion of error, reiterating its defenses under the acts of Congress; that is to say, that the assessment attempted was an assessment directly against the property of the bank itself, and not against the shareholders. The suggestion of error will be found Tr. page 54-65; which suggestion of error was by the Supreme Court of Mississippi overruled February 25, 1918. Tr. 65.

The case was again remanded to the Circuit Court of Harrison County, Mississippi; whereupon, the petitioner filed a further and additional plea and objection to the assessment in question. In such plea, the petitioner reaffirmed and reiterated:

(1) That the assessment and attempted taxation was an assessment and taxation directly against the petitioner itself and its property.

(2) That there had been no assessment or attempted assessment made against the shareholders of the bank; although the petitioner, in compliance with the statute of the United States, kept a list of the stockholders, with the post-office address thereof, at the place of its domicile.

(3) That the attempted assessment was wrongful, illegal and discriminatory and in violation of the acts of Congress in respect to taxation of shares of stock in a national bank, in that, for the year 1903, the petitioner's total assets amounted only to \$107,000.00, that it was assessed and paid taxes upon property aggregating \$78,000.00, and that it could only be assessed with an additional amount, at the utmost, of \$29,000.00; whereas, the assessment in question, and which was being resisted, aggregated \$75,000.00; that such attempted assessment was in violation of Section 5219 of the Revised Statutes of the United States prohibiting the taxation of the share of stock in a national bank at a greater rate than is assessed upon other money capital.

This plea will be found Tr. 2-15.

In obedience to and out of deference to the Supreme Court of the State of Mississippi, the judge of the Circuit Court of Harrison County, Mississippi, sustained the demurrer of the respondent, and affirmed the assessment made by the respondent. Tr. 25. From which judgment of affirmance, an appeal was had to the Supreme Court of the State of Mississippi, and the judgment of the lower court, affirming the assessment of taxes against the petitioner was affirmed, July 14, 1920.

The Supreme Court of the State of Mississippi used the following language in affirming the case:

“This cause is controlled by the decisions rendered on former appeals thereof.”

(4) Counsel for petitioner then filed an elaborate suggestion of error before the Supreme Court of the State of Mississippi, in which it was earnestly urged and insisted that the attempted assessment was an assessment against the property of the petitioner and operated directly thereupon; that no notice had ever been given to the shareholders, and that petitioner was not authorized, empowered or directed, under the statutes of the State of Mississippi, to pay the taxes for and on behalf of stockholders, and that no demand had ever been made upon stockholders therefor. The Federal questions hereinbefore raised by the pleadings in the case, and hereinbefore referred to, were urged elaborately again upon the court. The suggestion of error will be found Tr. 32-41.

Upon the 12th day of July, 1920, the petitioner's suggestion of error was overruled. Tr. 41.

(5) There were directly presented to the Supreme Court of the State of Mississippi in said cause two Federal questions:

(1) As to whether or not the assessment in ques-

tion was an assessment against the bank itself, in violation of the Revised Statutes of the United States.

(2) As to whether or not the attempted assessment, even if against the shareholders of the bank, and not against the bank itself, discriminated against the shareholders of petitioner bank, because the taxation was at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state; it being contended by the petitioner that there was no statute in the State of Mississippi requiring it to be taxed for its shareholders; that it was not made the agent for the shareholders of the bank for such purpose by any statute of the State of Mississippi; that no demand was ever made upon the shareholders of the bank therefor; no assessment or attempted assessment ever made against the shareholders of the bank for the taxes, or any part thereof, and that the assessment in question was a direct attempt to assess the property of the bank, and to make the tax a charge upon its assets. It was further contended by the petitioner that for the year 1903, the citizen tax-payer would only have paid upon property at a valuation of \$107,000.00; that it paid upon \$78,000.00; that if there was any deficiency at all, the deficiency was only for \$29,000.00. Still, under the assessment in question, an assessment of \$75,000.00 is made for the year 1903; being an assessment of \$46,000.00 in excess of what an individual in the State of Mississippi would have been required to pay upon the same property.

(6) The Supreme Court of the State of Mississippi denied the defenses set up by the petitioner, based upon the acts of Congress, hereinbefore referred to. The Supreme Court of the State of Mississippi held that the assessment in question was one against the shareholders of the bank, and that the property of the bank was not assessed at any greater rate of taxation than the property of a citizen. The opinions of the Supreme Court of the State of Mississippi dealing with the subject-matter have been hereinbefore referred to.

(7) This petitioner has been denied rights given to it by Section 5219 of the Revised Statutes of the United States, and its defenses based upon said act, and upon the rules and decisions of this court, and other Federal Courts, have been by the Supreme Court of the State of Mississippi denied and disallowed.

(8) The record presented by the Supreme Court of the State of Mississippi presents this question alone; that is to say, the applicability of the Federal statute hereinbefore referred to to the attempted assessment, and as to whether or not the attempted assessment was an assessment against the property of the petitioner or against its share holders, and as to whether or not there was any discrimination in respect thereto; which Federal questions were not only duly presented to but decided by the Supreme Court of the State of Mississippi.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant the writ of certiorari in this case, directed to the Supreme Court of the State of Mississippi, to bring up this case to this Court for such proceedings therein as to this Honorable Court may seem just.

FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI,

By 
ATTORNEYS.

State of Mississippi,
Hinds County.

Personally appeared before me, the undersigned authority for the state and county aforesaid, Wm. H. Watkins, personally known to me, who being by me first duly sworn, says that the above and foregoing petition is true to the best of his knowledge, information and belief; that his knowledge is derived from the record in the case and

from what has taken place in his presence and hearing in the courts in which action was heard.

.....
.....

Sworn to and subscribed before me, this.....day of August, 1920.

.....

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

.....
Attorney for Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION.

POINT ONE.

The assessment in this case was made directly against the First National Bank of Gulfport, Mississippi, petitioner, and not against the share-holders thereof.

This record discloses undisputably that the assessment made in this case was an assessment against the First National Bank of Gulfport, Mississippi. The notice of the Revenue Agent directed to the Sheriff and Tax Collector of Harrison county expressly stated that he had caused the Bank to be assessed for the years in question, and the assessment itself, that is to say, a certified copy of the assessment roll, shows the assessment to be against the Bank. That this is true appears from the decision of the Supreme Court of Mississippi on the first appeal, before the Federal question was raised. In the case of Adams vs. the Peoples Bank of Biloxi, Et Al., 108 Miss., 346; 66 Southern, 407, on page 347, the following statement of fact by the Court itself is found:

“In accordance with the statute, (Section 4740 of the Code of 1906), the Revenue Agent gave notice to the Tax Collector of Harrison County to assess the First National Bank of Gulfport and the Peoples Bank of Biloxi, by way of additional assessment on the rolls in his hands, with certain property, to-wit: ‘Capital stock, surplus, undivided profits, and any other property assessable to the banks,’ which had escaped taxation during each of the years from 1902 to 1907 inclusive, by reason of not having been assessed. Objections were made by the bank to such assessments. The Board of Supervisors, upon the hearing, ordered that the assessment for back taxes be denied, rejected and vacated, and stated in the orders that the property sought to be taxed has been assessed

for taxes for the years mentioned. Upon the hearing upon appeal in the circuit court, before the Judge, jury being waived, the judgments of the Board of Supervisors were affirmed. From the judgments of the Circuit Court this appeal was prosecuted by the Revenue Agent. The assessments of the two banks are considered together in one case."

It is conceded there is no statute in the State of Mississippi authorizing or requiring a National Bank to pay the taxes of its share-holders and reimburse itself. The record also discloses undisputably that no demand was made upon the share holders in the bank for the taxes in question, and that no notice of any kind was given to them of the assessment, and no assessment was made against the share-holders.

"National Banks, organized under Act of Congress, are instrumentalities of the Federal government created for national public purposes, and as such are subject to the paramount authority of the United States. It has been held by the Supreme Court, not only that any attempt by a State to define their duties or control the conduct of their affairs is absolutely void, but that the 'respective states would be wholly without power to levy any tax, either direct or indirect, upon the National Banks, their property, assets or franchises, were it not for the permissive legislation of Congress'."

Judson on Taxation, Paragraph 281, citing *Owensboro National Bank vs. Owensboro*, 173 U. S., 664; 43 L. Ed. 850.

Taxation of the share holders of a National Bank is authorized and justified only under Section 5219 of the Revised Statute of the United States, which is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the val-

uation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State in which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

This court has made itself so clear upon the question of taxation of National Banks by State authorities, and the share-holders thereof that only a mere citation of authorities of this court is necessary.

From the authorities to which we will hereafter direct the attention of the court, the following rules may be deduced.

FIRST. The State can not assess or impose a tax of any kind upon a national bank or upon its capital or assets.

SECOND. In order that all the property within the State may yield a just portion of taxation, the State may, by appropriate legislation, tax the shares of stock in national banks.

THIRD. The State may, by appropriate legislation, make it the duty of a National Bank, as the agent of its

share-holders, pay taxes assessed against such share-holders, and its property may be levied upon to enforce the assessment, but the assessment must be made against the share-holders and not against the Bank.

In the case of the First National Bank of Louisville vs. the Commonwealth of Kentucky, 9 Wall, 353; 19 L. Ed. at page 701, this court held that the tax imposed by the State of Kentucky against the shares of stock in a National Bank of fifty cents per share, was a valid tax, and was collectable, but that the tax was not one on the capital of the bank, but against the stock, though the statute could require the bank to pay the same.

In the case of Van Slyke vs. Wisconsin, 78 U. S., Page . . . 20 L. Ed., page 240, it is held that the tax imposed by the laws of the State of Wisconsin on the shares of stock in a National Bank were valid and enforceable.

In the case of Rosenblatt, Collector, vs. Walter S. Johnson, Receiver, 104 U. S., 562; 26 L. Ed. at page 833, it is held that the assets of an insolvent National Bank in the hands of a Receiver were not subject to State taxation.

In the case of the First National Bank of Aberdeen vs. County of Chelahlis, 166 U. S., 440; 41 L. Ed., at page 1069, the laws of the State of Washington provided for the assessment of shares of stock in a National Bank, and it was made the duty of the bank to pay the tax as agent of its share holders. In that case the shares of stock were assessed directly to the bank itself. The bank failed and refused to pay the tax. Its property was about to be levied upon therefor, and it sued out an injunction thereupon. This court held that the assessment was proper and could be enforced out of the assets of the bank. It must be borne in mind, however, that in that case the assessment was made against the shareholders of the bank, and not against the bank itself.

The question involved herein was directly presented to this court in the case of Owensboro National Bank vs. City of Owensboro, 173 U. S., 664; 43 L. Ed. at page 850. In that case, acting under the Kentucky statute, the authorities sought to impose a tax directly upon a National Bank, and not upon its share holders, and the facts in that case, are identical with the case before the court. This court held that the tax could not be enforced, using the following language:

“The tax then, as defined in the law, as interpreted by the court of appeals of Kentucky and by this court in the opinions from which we have excerpted, is a tax nominally on the franchise of the corporation, but in reality a tax on all the intangible property of the corporation. The proposition then comes to this: Nothing but the shares of stock in the hands of the shareholders of a national bank can be taxed, except the real estate of the bank. The taxes which are here resisted are not taxes levied upon the shares of stock in the names of the shareholders, but are taxes levied on the franchise or intangible property of the corporation. Thus, bringing the two conclusions together, there would seem to be no escape in reason from the proposition that the taxing law of the state of Kentucky is beyond the authority conferred by the act of Congress, and is therefore void for repugancy to such act.

It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority,

since, as already shown, without the grant made by the act of Congress there would be no power at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? This is the question.

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemption from taxation or of the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decision of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock in the name of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear."

"There being then no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal.

Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nev-

ertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company vs. Kentucky*, *supra*, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any proven case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.

The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation which have evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing, without reason,

a principle inconsistent with the law and destructive of the safeguards which it imposes.

From the foregoing conclusions, it results that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void, and the decree below must be and the same is hereby **reversed** and the cause be remanded for further proceedings not inconsistent with this opinion, and it is so ordered."

The case of the National City Bank vs. City of Richmond, 42 Federal, 877, is directly in point, wherein the court used the following language:

"It was in view of this that Congress provided (Rev. Stat. Sec. 5210) that every national bank should keep at all times a full and correct list of the names and residences of all the shareholders of the association, and the number of shares held by each, to be open to the inspection of all of the shareholders and the officers authorized to assess taxes under state authority. The last clause would be useless if the state officers were permitted to discover the number of shares the bank had issued, and then assess the tax on them **in solido** against the bank at market value. The method of assessment of this tax was illegal in the first instance and void, and no act of the general assembly of Virginia can validate it. The case of Supervisors vs. Stanley, 105 U. S. 305, which has been urged in argument in support of the validating act above quoted, is not in point. There it appears the assessment was against the stockholders. We think the injunction heretofore granted should be made perpetual, and it is so ordered."

The same is decided in the case of Brown vs. French, District Court of Montana, 80 Fed. 166.

In Judson on Taxation, Paragraph 286, the following rule is announced:

“Where the bank has been made liable for the payment of the tax upon the shares of its stockholders, it has been held that the State may force the bank to pay the tax by distraint of its property. The distinction however between a tax upon the bank as the statutory agent of its shareholders and a tax upon the bank property as such must be preserved, as the former tax is authorized by the act of Congress and the latter is not. Thus an assessment upon the property as such, or against the bank upon the stock *in solido*, is invalid. This distinction is essential for the further reason that in states where deduction of debt is allowed in the assessment of “other moneyed capital,” the national bank shareholder is entitled to a deduction of his personal indebtedness.”

In CYC. Vol. 37, at page 832, the following rule is announced:

““An owner of shares of stock in a national bank is not exempt from taxation thereon by reason of the nature of the institution or its relation to the federal government; on the contrary, by express permission of the Act of Congress, such shares are assessable and taxable to him, under state laws, like any other personal property. But it must be distinctly borne in mind that it is the interest of the stockholder, not of the bank, that is taxable, and hence the assessment must be made in the name of the individual shareholder; it is not permissible to assess the aggregate of shares of stock *in solido* to the bank itself.

The supreme court of the State of Mississippi in rendering the decree sought to be appealed from herein, cited

the case of Home Saving Bank vs. City of Des Moines, 205 U. S., 503; 51 L. Ed. 901.

That case, however, in no manner tends to support the decision in this case. In that case, under the Iowa statute, the tax authorities assessed the shares in a national bank directly to the bank, and included therein the bonds and securities of the United States government. It was held by this court that such was a tax upon the property of the bank, and was not justifiable, using the following language:

“That the law was administered upon the theory that the tax was upon the property of the corporation is signally illustrated by the proceedings in these cases. The valuation was first made on the exact figures of the capital, surplus and undivided earnings, deducting the holdings of the United States securities. Then, upon being advised that the deduction was erroneous, the assessor corrected the valuation by adding the value of the securities deducted. We therefore conclude that the substantial effect of the law is to require taxation upon the property, not including the franchise, of the banks, and that the value of the shares, ascertained in a manner appropriate to determine the value of the assets, is only the standard or measure by which the taxable valuation of that property is determined. This we think is consistent with the interpretation of the law by the supreme court of Iowa, which sustained the taxation upon grounds which will be presently considered.”

“If mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. The argument that public policy exacts that where there is an equality in

amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of a serious consideration." These words apply with equal force to the case at bar. Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax Case, and, indeed, all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed.

We regret that we are constrained to differ with the supreme court of the state on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear. If, by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

The case of First National Bank vs. McNeel, 38 Fed. 559 is not directly in point.

It is not perfectly clear that under the Mississippi statutes if a bank should pay the tax it would have the right to recover the same from its shareholders. The Statute creates no such duty, and therefore imposes no liability on the stockholders to reimburse the bank. But aside from that question, the imposition of taxes by state authority, directly upon the estate of the bank itself, is in violation of the act of Congress in respect thereto and cannot be justified.

POINT TWO.

The assessment of taxes was discriminatory. If petitioner should be compelled to pay the tax in question, it would be an unequal and excessive tax. In other words, it would pay a tax on a valuation of \$46,000.00 in excess of the actual value of its property for the year 1903.

Section 112 of the Constitution of the State of Mississippi, is in the following language:

Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessments as in other cases of property situated and assessed in the county."

This section provides a uniform system of taxation. The property of any other moneyed corporation could not be taxed, as was done in this case under the constitution or the laws of the State of Mississippi.

See the case of the First National Bank vs. Chapman, 173 U. S. 205; 43 L. Ed. 669; First National Bank vs. Albright, 208 U. S. 614.

See also the very recent case of the Bank of California vs. Richardson, 248 U. S. 476; 63 L. Ed. 372.

POINT THREE.

FEDERAL QUESTION RAISED.

The defenses of the petitioner arising under the Federal statute referred to was first raised in the circuit court of Harrison county, by plea. It was raised again by amended plea at the time of the third trial. The questions were presented to the Supreme Court of the state of Mississippi by the assignment of error, and specifically discussed in each of the suggestions of error to which the attention of the court is directed in the petition.

The Federal questions were not only raised, but on the first appeal after the Federal question was pleaded, the Federal questions were actually decided and passed upon by the Supreme Court in the case of Adams, Revenue Agent vs. First National Bank, 116 Mississippi, 450.

Upon the last appeal the previous appeal was reaffirmed. The last appeal is reported in 84 Southern, page 707, where the court said: "The case is controlled by the decision rendered on former appeals thereof, 116 Miss., 450; 77 Southern, 195.

A Federal question is always deemed properly raised where the State court proceeds to determine the question.

Meedrich vs. Launstein, 232 U. S. 236; 58 L. Ed. 584; St. L. I. M. R. R. Co. vs. Hesterly, 228 U. S. 702; 57 L. Ed. 1031; North Carolina vs. Zacelly, 232 U. S. 248; 58 L. Ed. 591.

We respectfully submit that the writ of certiorari prayed for should be granted.

..... 
Attorney for Petitioner.

**IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA**

**IN THE MATTER OF THE PETITION OF THE FIRST
NATIONAL BANK OF GULFPORT, MISSISSIPPI,
FOR WRIT OF CERTIORARI, DIRECTED TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI,
TO BRING UP BEFORE THE SUPREME COURT OF
THE UNITED STATES THE CASE OF THE FIRST
NATIONAL BANK OF GULFPORT, MISSISSIPPI,
PETITIONER, V. WIRT ADAMS, STATE REVENUE
AGENT, RESPONDENT.**


SIRS:

Please take notice that, upon a certified copy of the transcript of the record herein, and upon the annexed petition and the brief accompanying it, filed on behalf of petitioner herein, and duly sworn to, I, shall move the motion hereto annexed before the Supreme Court of the United States, at the capitol in the City of Washington, District of Columbia, on Monday, the 4th day of October, 1920, at the opening of the court on that day, or as soon thereafter as counsel can be heard; and that I shall then and there move for such further relief in the premises as may be just.

Witness my signature, this.....day of Sept., 1920.

WM. H. WATKINS,
Attorney for Petitioner.

To Jos. Mize, Esquire, Attorney for Wirt Adams,
Revenue Agent of the State of Mississippi, Respondent.



**IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA**

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NATIONAL BANK OF GULFPORT, MISSISSIPPI,
FOR WRIT OF CERTIORARI, DIRECTED TO THE
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NATIONAL BANK OF GULFPORT, MISSISSIPPI,
PETITIONER, V. WIRT ADAMS, STATE REVENUE
AGENT, RESPONDENT.**

And, now, comes the petitioner herein, the First National Bank of Gulfport, by its Attorney, and moves this court, upon certified copy of the Transcript of the Record herein, and upon the annexed petition duly sworn to, for writ of certiorari directed to the Supreme Court of Mississippi, to bring before this Honorable Court the case of the First National Bank of Gulfport, Mississippi, Petitioner, v. Wirt Adams, State Revenue Agent, Respondent, recently decided by the Supreme Court of Mississippi, for such proceedings therein as to this Court may seem just, and for such other relief as may be just.

.....
Attorney for Petitioner.

I acknowledge receipt of copies of the above and foregoing petition, brief, motion and notice, all of which have this day been delivered to me, this the..... day of September, 1920.

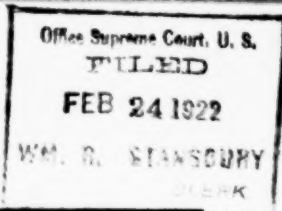
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In the Supreme Court of the United States

NO. 136.

OCTOBER TERM, 1921.

THE FIRST NATIONAL BANK OF GULFPORT,
MISSISSIPPI,
Plaintiff in Error,

Vs.

WIRT ADAMS, REVENUE AGENT OF THE STATE
OF MISSISSIPPI,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

WM. H. WATKINS,
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WATKINS, WATKINS & EAGER,
HANUN GARDNER,
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Of Counsel.

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WM. H. WATKINS,
Attorney for Plaintiff in Error.

STATEMENT

(1) The plaintiff in error, the First National Bank of Gulfport, Mississippi, is a corporation chartered under the acts of the Congress of the United States, domiciled at Gulfport, Harrison County, Mississippi.

(2) Section 4737 of the Mississippi Code of 1906, being Section 7055 of Hemingway's Code of the State of Mississippi, provides for the creation of the office of State Revenue Agent. The section is in the following language:

“There shall be a state revenue agent, who shall be elected at the general election in the same manner that other state officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified.”

Section 4740 of the Mississippi Code of 1906, being Section 7058 of Hemingway's Code of the State of Mississippi, provides a system for back assessing property escaping taxation. The section is as follows:

“After the expiration of the fiscal year in which taxes become due, should the revenue agent discover that any person, corporation, property, business, occupation or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the tax collector shall, within ten days thereafter, make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment, and the state revenue agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by Section 7006, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per

cent damages thereon. If the assessment rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the revenue agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections."

Sections 4273, 4274 and 4275 of the Mississippi Code of 1906, being Sections 6907, 6908 and 6909 of Hemingway's Code of the State of Mississippi, provide for the assessment of banks, such sections being as follows:

"The president, cashier or other officer having like duties, of each bank or banking association in this state, whether existing by the laws of this state or of the United States, shall deliver to the assessor of taxes of the county in which it is located, a written statement, on or before the first day of May in each year, under oath, of the number and amount of all the shares of its capital stock paid in, or if it be not a corporation or joint stock company, then the amount of its capital, and of the sum of all undivided profits, or surplus or accumulation of any sort constituting part of the assets of the bank and not including its real estate, and the value of such shares estimated at par and increased by the proportion of the par value of all the shares of the stock to the said surplus fund or accumulation, or of the amount of its capital so increased, shall be the basis of the taxation of such shares to the holder or of the capital to the owner

thereof; but if the shares of such bank or association are of less value than par, they shall be valued accordingly."

"Every bank or banking association shall, on or before the first day of December in each year, pay to the collector of taxes in the county in which such bank or association is located, the amount of state and county taxes due by the assessment, which shall be the per centum levied for the state and county severally on the value of property, real and personal; and, for any failure to pay such taxes, its assets shall be liable to be proceeded against and dealt with as provided by law in other cases for failure to pay taxes."

"The real estate of a bank or banking association shall be assessed and pay taxes—state, county or municipal, according to its value, as other real estate."

There were no other statutes in force in the State of Mississippi at the time this litigation arose providing for the assessment of banks.

Upon the 28th day of July, 1908, the defendant in error, as revenue agent of the State of Mississippi, acting under Section 4740 of the Mississippi Code of 1906, hereinbefore set out, gave notice to the tax collector of Harrison County, Mississippi, to assess the property of plaintiff in error by way of additional assessment for the years 1903, 1904, 1905, 1906 and 1907, the notice being as follows, the same being found Transcript page 10:

"To the Tax Collector of Harrison County, Mississippi:

"You will take notice, and you are hereby notified, that the following described property, in said county, to-wit, capital stock, surplus, undivided profits and any and all other property properly assessable to banks, amounting to \$75,150.00, belonging to

and owned by the First National Bank of Gulfport, has escaped taxation during each of the years 1902, 1903, 1904, 1905, 1906 and 1907, by reason of not being assessed.

"You are by virtue of the Annotated Code of Mississippi of 1906, Chapter 131, Section 4740, now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment, on the roll or tax-list in your hands, and to give ten days notice in writing to said First National Bank whose property is so assessed, and also notify in writing the Board of Supervisors of said county, of said assessment.

"Herein fail not, under penalties imposed by said Code.

"Witness my signature, this the 29th day of July, 1908.

WIRT ADAMS, State Revenue Agent.

"By ALFRED D. GALLOWAY, Deputy.

"I have this day executed the within writ personally by delivering to the First National Bank, by handing to W. A. King, Vice-President of the said First National Bank, a true copy of this writ, this the 30th day of July, A. D. 1908.

"WM. REEVES, JR., Sheriff,

"By F. L. PATENOTTE, D. S."

The sheriff and tax collector, in accordance with the statute, made the assessment on the rolls in his office, in words and figures as follows:

"Amount of all other personal property not otherwise mentioned, \$174,000.00." (Transcript, page 12 1-2.)

The assessment came on for hearing by the Board of Supervisors of the county for confirmation, and the

same was disallowed by such board. Appeal was had to the Circuit Court of Harrison County, Mississippi, and the disapproval of the assessment by the Board of Supervisors affirmed.

Appeal was then had to the Supreme Court of the State of Mississippi, and the cause was reversed by that court, the case being reported, *Adams, State Revenue Agent v. People's Bank of Biloxi et al.*, 66 South. 407, 108 Miss. 346.

(3) The case was remanded to the Circuit Court of Harrison County, Mississippi, in which court the plaintiff in error filed a special plea, wherein it was alleged that the plaintiff in error was a national bank, organized and chartered under the acts of the Congress of the United States, and that the proceeding in question was an assessment against the assets and property of the bank itself and not against its shareholders, and that under the acts of Congress, it was not liable to taxation, and its property and assets could not be assessed for taxation and taxed, the said plea being found Tr. pages 27-28.

To which plea the respondent demurred on the ground that the plea was insufficient in law, Tr. page 29, which demurrer was by the trial court overruled on the ground that the attempted assessment was not an assessment against the stockholders of the bank, but was an assessment and attempt to tax directly the property of the bank itself; and the trial court thereupon affirmed the action of the Board of Supervisors in refusing to approve the tax. Tr. page 29.

An appeal was then had to the Supreme Court of the State of Mississippi, and the Supreme Court of the State of Mississippi reversed the decision of the Circuit Court of Harrison County, Mississippi, upon the 14th day of January, 1918. Its decision will be found reported, *Adams, State Revenue Agent v. First National Bank of Gulfport, Miss.*, 77 South. 195, 116 Miss. 450; said decision being as follows:

“This is a proceeding in which the revenue agent is attempting to back-assess the shares of appellee’s capital stock, together with the accumulations thereon, for the years 1902 to 1907, inclusive, during which it is alleged that these shares have escaped taxation. Appellee is a national bank, and claims, and the court below held, that the tax is imposed against it upon its capital stock as such, which the state is without power to do. It is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof, but the shares into which its capital stock is divided, and which are the property not of the bank but the stockholders thereof, may be taxed under the provisions of U. S. Revised States, Section 5219, (U. S. Comp. St. 1916, Section 9784), and the taxes imposed thereon may be collected in the first instance from the bank itself, ‘as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid from the shareholders.’ (*Home Savings Bank v. Des Moines*, 205, U. S. 503, 27 Sup. Ct. 571, 51 L.Ed. 910; *First National Bank v. McNeel*, 238 Fed. 559 151 C. C. A. 495); and such is the object sought to be accomplished by the statute by which the tax here sought to be collected is imposed. (*Bank of Oxford*, 70 Miss. 501, 12 So. 203; Constitution, Section 181; Code of 1906, Section 4237; Hemingway’s Code, Section 6970). That the statute makes no provision for a recovery by the bank from its shareholders for the taxes paid by it pursuant thereto is not material, for the reason that such recovery may be had ‘under the general principles of law that one who pays the debts of another, at his request, can recover the amount from him.’ *Home Savings Bank v. Des Moines*, *Supra*.”

The judgment and opinion of the court will be found, Tr. pages 32-33.

Counsel for plaintiff in error filed an elaborate suggestion of error, reiterating its defenses under the acts of Congress; that is to say, that the assessment attempted was an assessment directly against the property of the bank itself, and not against the shareholders. The suggestion of error will be found Tr. pages 34-41, which suggestion of error was by the Supreme Court of Mississippi overruled February 25, 1918, Tr. page 41.

The case was again remanded to the Circuit Court of Harrison County, Mississippi; whereupon, the plaintiff in error, filed a further and additional plea and objection to the assessment in question. In such plea the plaintiff in error reaffirmed and reiterated:

(a) That the assessment and attempted taxation was an assessment and taxation directly against the plaintiff in error itself and its property.

(b) That there had been no assessment or attempted assessment against the shareholders of the bank; although the plaintiff in error, in compliance with the statute of the United States, kept a list of the stockholders, with the postoffice address thereof, at the place of its domicile.

(c) That the attempted assessment was wrongful, illegal and discriminatory, and in violation of the acts of Congress in respect to taxation of shares of stock in a national bank, in that, for the year 1903, plaintiff in error's total assets amounted only to \$107,000.00; that it was assessed and paid taxes upon property aggregating \$78,000.00, and that it could only be assessed with an additional amount, at the utmost, of \$29,000.00; whereas, the assessment in question, and which was being resisted, aggregated \$75,000.00; that such attempted assessment was in violation of Section 5219 of the Revised Statutes of the United States prohibiting the taxation of the shares of stock in a national bank at a greater rate than is assessed upon other money capital.

This plea will be found, Tr. pages 2-13.

In obedience to and out of deference to the Supreme Court of the State of Mississippi, the judge of the Circuit Court of Harrison County, Mississippi, sustained the demurrer of the respondent, the defendant in error, and affirmed the assessment made. Tr. page 15. From which judgment of affirmance, an appeal was had to the Supreme Court of the State of Mississippi, and the judgment of the lower court, affirming the assessment of taxes against the plaintiff in error, was affirmed, July 14, 1920.

The Supreme Court of the State of Mississippi used the following language in affirming the case:

“This cause is controlled by the decisions rendered on former appeals thereof.” Transcript, page 19.

(4) Counsel for plaintiff in error, then filed an elaborate suggestion of error before the Supreme Court of the State of Mississippi, in which it was earnestly urged and insisted that the attempted assessment was an assessment against the property of plaintiff in error and operated directly thereupon; that no notice had ever been given to the shareholders, and that plaintiff in error was not authorized, empowered or directed, under the statutes of the State of Mississippi, to pay the taxes for and on behalf of the stockholders, and that no demand had ever been made upon the stockholders therefor. The Federal questions hereinbefore raised by the pleadings in the case, and hereinbefore referred to, were urged elaborately again upon the court. The suggestion of error will be found, Tr. page 20.

Upon the 12th of July, 1920, the plaintiff in error's suggestion of error was overruled, Tr. page 26.

(5) There were directly presented to the Supreme Court of the State of Mississippi in said cause two Federal questions:

(a) As to whether or not the assessment in question was an assessment against the bank itself, in violation of the Revised Statutes of the United States; and

(b) As to whether or not the attempted assessment, even if against the shareholders of the bank, and not against the bank itself, discriminated against the shareholders of plaintiff in error because the taxation was at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state; it being contended by the plaintiff in error that there was no statute in the State of Mississippi requiring it to be taxed for its shareholders; that it was not made the agent for the shareholders of the bank for such purpose by any statute of the State of Mississippi; that no demand was ever made upon the shareholders of the bank therefor; no assessment or attempted assessment ever made against the shareholders of the bank for the taxes, or any part thereof, and that the assessment in question was a direct attempt to assess the property of the bank, and to make the tax a charge upon its assets. It was further contended by the plaintiff in error that for the year 1903, the citizen tax-payer would only have paid upon property at a valuation of \$107,000.00; that it paid upon \$78,000.00; that if there was any deficiency at all, the deficiency was only for \$29,000.00. Still, under the assessment in question, an assessment of \$75,000.00 is made for the year 1903, being an assessment of \$46,000.00 in excess of what an individual in the State of Mississippi would have been required to pay upon the same property.

(6) At the October term, 1920, plaintiff in error applied to this Court and obtained, by reason of the Federal questions involved herein, a writ of certiorari from this Court to the Supreme Court of the State of Mississippi.

ARGUMENT.

Point 1:

The assessment complained of in this case was made directly against the property of the plaintiff in error, and not against the shareholders thereof.

Section 5219 of the Revised Statutes of the United States, (Section 9784, Compiled Statutes 1916), is in the following language:

“Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.”

This section constitutes the measure of the right of the State to assess the shares of a national bank. It is expressly prohibited from assessing the property of the bank, other than its real estate, but it permits the assessment of the shares of the bank, provided discrimination is avoided. Without this section the shares of stock in a national bank would not be subject to taxation.

In the case of *Bank of California vs. Richardson*, 248 U. S. 476, 63 L. Ed. 372, Mr. Chief Justice White, in de-

livering the opinion of the Court, used the following language:

“The forms of expression used in the section make it certain that, in adopting it, the legislative mind had in view the subject of how far the banking associations created were or should be made subject to state taxation, which presumably it was necessary to deal with in view of the controversies growing out of the creation of the Bank of the United States, and dealt with by the decisions of this court, *McCullough v. Maryland*, 4 Wheat, 316, 436, 4 L. ed. 579, 608; *Osborn v. Bank of United States*, 9 Wheat, 738, 867, 6 L. ed. 204, 234; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481.

“There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt, and thus furnish the exclusive rule governing state taxation as to the Federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court. *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 154, 30 L. ed. 895, 901, 7 Sup. Ct. Rep. 901; *Owensboro Nat. Bank v. Owensboro*, 173, U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

“Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources en-

engaged in their development might not be withdrawn from the reach of state taxation, but, on the contrary, that every resource possessed by the banks, as national agencies might, in substance and effect, remain liable to state taxation.

“The first aim was attained by the non-recognition of any power whatever in the states to tax the Federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such.”

Congressional silence upon the subject would be a prohibition against any form of taxation. *First National Bank v. Richmond*, 39 Fed. 309; appeal dismissed, 149 U. S. 769, 37 L. ed. 959.

In the case of *Rosenblatt, Collector, v. Walter S. Johnson, Receiver*, 104 U. S. 562, 26 L. ed. 833, it was held that the assets of an insolvent national bank in the hands of a receiver under the Federal statutes, were not subject to state taxation.

In the case of *First National Bank of Aberdeen v. County of Chehalis*, 166 U. S. 440, 41 L. ed. 1069, the statutes of the State of Washington provided for the assessment of shares of stock in a national bank, and it was made the duty of the bank to pay the tax as agent of the shareholders, and the shareholders were made liable to the bank for the amount so expended. In that case, the shares of stock were assessed directly to the bank itself. The bank failed and refused to pay the tax. Its property was about to be levied upon therefor, and it obtained a writ of injunction. This Court held that the assessment was proper and could be enforced out of the assets of the

bank. ~~It must be borne in mind, however, that in that case the assessment was made against the shareholders of the bank, and not against the bank itself.~~

The question was presented in the case of *Owensboro National Bank v. City of Owensboro*, 173 U. S. 664, 43 L. ed. 850. In that case it appeared that a statute of the State of Kentucky imposed a franchise tax upon the property of a national bank. This Court held that the tax could not be enforced, using the following language:

“The tax then, as defined in the law, as interpreted by the court of appeals of Kentucky and by this court in the opinions from which we have excerpted, is a tax nominally on the franchise of the corporation, but in reality a tax on all the intangible property of the corporation. The proposition then comes to this: Nothing but the shares of stock in the hands of the shareholders of a national bank can be taxed, except the real estate of the bank. The taxes which are here resisted are not taxes levied upon the shares of stock in the names of the shareholders, but are taxes levied on the franchise or intangible property of the corporation. This, bringing the two conclusions together, there would seem to be no escape in reason from the proposition that the taxing law of the State of Kentucky is beyond the authority conferred by the act of Congress, and is therefore void for repugnancy to such act.

“It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, with-

out the grant made by the act of Congress there would be no power at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? This is the question.

“To be equivalent in law involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemption from taxation or of the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decision of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock in the name of the stockholders. A brief review of the two classes of cases by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear.

“There being then no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal.

“Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is never-

theless one in fact, and therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company vs. Kentucky*, supra, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any proven case. The argument that public policy exacts that where there is an equality in amount between the unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.

“The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation which have evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing without reason a principle inconsistent with the law and destructive of the safeguards which it imposes.

"From the foregoing conclusions, it results that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void, and the decree below must be and the same is hereby reversed and the cause be remanded for further proceedings not inconsistent with this opinion, and it is so ordered."

The Supreme Court of the State of Mississippi, in deciding the case, conceded that the capital stock or property of the plaintiff in error could not be taxed. The Court said:

"Appellee is a national bank and claims, and the court below held, that the tax is imposed upon its capital stock as such, which the State is without power to do. It is true that a national bank is not subject to taxation upon its capital stock by the State or any subdivision thereof, but the shares into which its capital stock is divided and which are the property not of the bank but of the shareholders thereof, may be taxed."

So, the question is squarely presented in this case as to whether or not the tax in question is a tax on the assets and property of the bank, or a tax against the shareholders. The assessment appealed from is found on page 15 of the Transcript, and is in the following language:

"This day this cause came on to be heard on the demurrer of the plaintiff to the plea of the defendant, First National Bank, said plea being filed on the 27th day of April, 1918, setting up that a national bank is not taxable and assessable as attempted to be levied by the State Revenue Agent, and the Court having heard and considered demurrer to said plea, is of the opinion that said demurrer should be sustained; and, leave being granted the defendant to plead further in open Court, the defendant declined

so to do, and the Court is of the opinion that the plaintiff should have judgment and the bank should be assessed as directed herein by the Revenue Agent.

"It is therefore by the Court ordered, that the Board of Supervisors of Harrison County, Mississippi, be and they are hereby directed and ordered to assess the First National Bank of Gulfport, Mississippi, with capital stock, surplus, undivided profits and any and all property assessable to said bank, in the sum of \$75,150.00 for the years 1903, 1906 and 1907, which said property was at said time owned by said First National Bank and which had escaped taxation for each of the years as hereinbefore set out; and said Board of Supervisors is hereby directed to make such assessment by way of additional assessment on the roll and tax list of Harrison County, Mississippi; and said Board of Supervisors is further ordered to notify the Tax Collector of Harrison County of said assessment. And it is further ordered by the Court that said defendant be taxed with all costs herein, for which let proper process issue."

It will be noticed that the assessment is not an assessment of the shares of stock in the bank, either to the bank itself or to the shareholders. Upon the other hand, there is an assessment in solido against the bank itself, of \$75,150.00 for each of the years 1903, 1906 and 1907, and the assessment is against the capital stock, surplus, undivided profits, and any and all other property assessable to the bank. This was in no sense an assessment of the shares of stock in the bank. The capital stock and surplus and undivided profits, as well as any and all other property assessable, as stated in the order, to said bank, is the property of the bank itself and not of the shareholders. It is of course well settled that the shares of stock in a bank are entirely independent and distinct from the capital stock, surplus and undivided profits of the

nk. The shares of stock belong to the stockholders; the capital stock, surplus and undivided profits belong to the bank.

In the case of *Perry F. Powers, as Auditor, v. Detroit, G. H. & M. Railroad Company*, 201 U. S. 543, 50 L. ed. 866, the following language was used:

“The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank and the means of conducting its operation. * * * The capital stock and the shares may both be taxed, and it is not double taxation.”

In the case of *Home Savings Bank v. City of Des Moines*, 205 U. S. 503, 51 L. ed. 901, the Court used the following language:

“The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *McCulloch v. Maryland*, 4 Wheat, 314, 4 L. ed. 579, where, in the opinion of Chief Justice Marshall declaring a tax upon the circulation of a branch bank of the United States beyond the power of the state of Maryland, it was said that the opinion did not extend ‘to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.’ The distinction appears, however, to have been first made the basis of a decision in *Van Allen v. Assessors (Churchill v. Utica)*, 3 Wall. 573, 18 L. ed. 229. The national bank act, as amended in 1864 (13 Stat. at L. 112, chap. 106), (Rev. Stat. sec. 5219, U. S. Comp. Stat. 1901, p. 3502), permitted the states

to include in the valuation of personal property for taxation the shares of national banks 'held by any person or body corporate' under certain conditions not necessary here to be stated. Acting under the authority of this law, the State of New York assessed the shares of Van Allen in the First National Bank of Albany. At that time all the capital of the bank was invested in United States securities, and it was asserted that a tax upon the individual in respect of the shares be held in the bank was, unless the holdings in United States securities were deducted, a tax upon the securities themselves. But a majority of the court held otherwise, saying by Mr. Justice Nelson: 'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitled him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the Act of Congress has left subject to taxation by the states, under the limitation prescribed.'

"In an opinion in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect of their shares was an actual though an indirect tax on the

property of the corporation itself. But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion which would be little short of chaos."

In the case of *Hawley v. City of Malden*, 232 U. S., page 1, 58 L. Ed. 457, this Court, speaking through Mr. Justice Hughes, used the following language:

"It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (*Van Allen v. Assessors*) (*Churchill v. Utica*), 3 Wall 573, 584, 18 L. Ed. 229, 234; *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558, 560; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137, 29 L. Ed. 830, 832, 6 Sup. Ct. Rep. 645; *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411, 413, 7 Sup. Ct. Rep. 198; and the rulings in which the state cases which we have cited proceed upon the view that shares are personal property, and, having no situs elsewhere, are taxable by the state of the owner's domicile, whether the corporations be foreign or domestic."

In the case of *Rogers v. Hennepin*, 240 U. S. 184, 60 L. Ed. 594, it is held that a tax on memberships of an incorporated exchange is a distinct tax from one on the assets of the corporation itself. The following additional authorities are directly in point: *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Davidson v. New Orleans*, 96 U. S. 97-106, 24 L. Ed. 616, 620; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645, 649.

Neither is it sufficient that the tax imposed is equivalent to a tax on the shares of stock. In the case of *Owens-*

boro National Bank v. City of Owensboro, supra, speaking upon that direct point, this Court said:

“To be equivalent in law involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemption from taxation or of the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decision of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock in the name of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear.

“There being no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress and was therefore illegal.

“Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according

to the Act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment."

And again, in the case of *Home Savings Bank v. City of Des Moines*, 205 U. S. 503, 51 L. Ed. 901, this Court said:

" 'If mere coincidence of the sum of taxation is to be allowed to frustrate the provisions of the Act of Congress, then that Act becomes meaningless and the power to enforce it in any given case will not exist. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of a serious consideration.' These words apply with equal force to the case at bar. Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax case, and, indeed, all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

In this connection we will differentiate the cases cited by the Supreme Court of the State of Mississippi. The first case cited is that of *Home Savings Bank v. Des Moines, supra*. That case did not involve the question of the taxation of a national bank at all. The question involved in that case was as to whether or not in assessing the shareholders of a state bank, the bonds and securities of the United States Government, which were expressly made non-assessable, should be included in the valuation. This Court, upon that question, said:

"That the law was administered upon the theory that the tax was upon the property of the corpora-

tion is signally illustrated by the proceedings in these cases. The valuation was first made on the exact figures of the capital, surplus and undivided earnings, deducting the holdings of the United States securities. Then, upon being advised that the deduction was erroneous, the assessor corrected the valuation by adding the value of the securities deducted. We therefore conclude that the substantial effect of the law is to require taxation upon the property, not including the franchise, of the banks, and that the value of the shares, ascertained in a manner appropriate to determine the value of the assets, is only the standard or measure by which the taxable valuation of that property is determined. This we think is consistent with the interpretation of the law by the Supreme Court of Iowa, which sustained the taxation upon the grounds which will be presently considered."

There was no effort in that case, whatsoever, to tax either the property or the shares of a national bank, and the question was not even involved.

The case of the *First National Bank of Jackson, Mississippi v. McNeill*, C. C. A. 5th Circuit, 238 Fed. 559, is not at all in point. In that case the First National Bank endeavored to deduct from its Federal income tax amounts paid by it as statutory agent for its stockholders, as taxes to the fiscal authorities of the State of Mississippi. The Circuit Court of Appeals held that the Supreme Court of Mississippi had, in effect, construed its statutes to mean that the liability for taxes under the laws of the State of Mississippi was upon the shareholders, and that in discharging the tax in question, the First National Bank was paying the liability of its shareholders, which it could recover although the statute contained no express provision to that effect. This proposition amounted to nothing more than that the Supreme Court of the State of Mississippi, in the

case of *Bank v. Oxford*, 70 Miss. 504, 12 South. 203, had imposed the liability for taxes upon the shareholders and not upon the bank. Of course it is the function of the Supreme Court of the State of Mississippi to construe its own statutes, and if it decides that its laws constitute a national bank as statutory agent to pay the tax for its shareholders, we are possibly not concerned with the construction, since it is for the Supreme Court of the State of Mississippi to say what its statutes mean. But a complete reply to the whole argument is that the assessment in this case is not against the shareholders of the bank but is expressly against the bank itself. The assessment is not one against the shareholders, nor is it an assessment of the shares themselves to the bank. Upon the other hand, it is an assessment to the bank of its own property, to-wit: its capital and surplus and undivided profits, as well as any other property which it may own liable to taxation. The capital stock, surplus and undivided profits, as we have above indicated, belong to the bank and not to the shareholders. In other words, the assessment against the plaintiff in error cannot be changed to an assessment against its shareholders by merely so designating it. As to whether the assessment is against the bank or against its shareholders depends entirely upon the terms of the assessment itself, and its essential nature can in no manner be changed by calling it something which it is not. We direct the attention of the Court to the fact that on the first appeal, 108 Miss. 346, 66 South. 407, the following language was used:

“In accordance with the statute, (Section 4740 of the Code of 1906), the Revenue Agent gave notice to the Tax Collector of Harrison County to assess the First National Bank of Gulfport and the Peoples Bank of Biloxi, by way of additional assessment on the rolls in his hands, with certain property, to-wit: ‘Capital stock, surplus, undivided profits, and any other property assessable to the banks’, which

had escaped taxation during each of the years from 1902 to 1907 inclusive, by reason of not having been assessed. Objections were made by the bank to such assessments."

There was an express adjudication on the part of the Supreme Court of the State of Mississippi that the assessment was one against the bank, of its own property, to-wit: its capital stock, surplus and undivided profits, as well as any other property owned by it.

In the case of *Stapleton v. Tax Collector*, C. C. A., 5th Circuit, 91 Fed. 93, it was held that an assessment of the personal property of a national bank to the bank itself cannot be regarded as one against the stockholders on their shares.

In the case of *Wiser National Bank v. Jeffries*, 14 Idaho 659, 95 Pac. 23, it was held that under a statute authorizing the assessor to assess the shares of stock of national banks to individual owners thereof, an assessment of the capital stock to such banks themselves was not permitted. The Court used the following language:

"In *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850, it was held that the provisions of said section of the Revised Statutes of the United States are the measures of the power of a state to tax national banks, their property or their franchises. The court held: 'This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any tax, therefore, which is in excess of, and not in conformity to, these requirements, is void.' It will be observed from the provisions of that section that all shares of stock of the stockholders may be included in the valuation of the personal property of

the owner or holder of such shares in assessing taxes imposed by the authority of the state in which the bank is located; and, under the provisions of said section, the state or county may tax the real estate belonging to such bank.

“It will be observed from the stipulated facts that the ‘capital stock’ was assessed, and not the shares of capital stock. The term ‘capital stock’ does not mean ‘shares of capital stock’ but means the actual money or property paid in and possessed by the corporation. *State Bank of Va. v. City of Richmond*, 79 Va. 113. Neither under said statute of the United States nor under the revenue law of the state of Idaho is there any authority to tax the capital stock of national banks. The assessor is given no authority or jurisdiction to assess the capital stock of the appellant bank. He is given authority to assess the real estate belonging to the bank and to assess the shares of stock to the owners thereof. The taxes so assessed must be paid by the bank. Section 43 of the revenue law, approved March 22, 1901, (Sess. Laws 1901, p. 249), is as follows: ‘The stockholders of every banking association located in this state, and organized under the laws of the United States or of this state, must be assessed and taxed on the value of their shares of stock therein in the county, city, town, village and independent school district, authorized by law to collect revenue as in this act provided, where such bank is located, whether the stockholders there reside or not; such shares must be listed and assessed with regard to the value of such shares by reason of any net individual profits or surplus of such corporation, and with regard to the ownership thereof, subject, however, to all deductions allowed in the assessment of other moneyed capital and subject to the restriction that taxation of such shares must not be at a greater rate than is assessed on any other

moneyed capital in the hands of individual citizens of the state in the place where such bank is located. Every such banking association must furnish to the assessor a full and correct list of the names and residence of its stockholders and the number of shares held by each. The taxes upon such shares must be assessed against the holder of the same in the list of personal property and must be paid by the bank. The real estate of such banking association is subject to state, county, municipal and district taxation as other real estate.' It will be observed from the provisions of said section that the stockholders of a national bank may be assessed and taxed on the value of their shares of stock; but there is no provision in said section authorizing the assessment of the 'capital stock' of the bank, and the provisions of said Section 43 are in conformity with the provisions of said Section 5219 of the Revised Statutes of the United States. We conclude, therefore, that the assessor had no jurisdiction or authority to assess the capital stock of said bank to the bank, or at all."

In the case of *Smith v. First National Bank*, 17 Mich. 479, the same was held.

The pleadings in the case at bar admit that a complete and correct list of the shareholders of the bank was kept at the domicile thereof, available to the taxing officers of the State of Mississippi, and that no demand or request was ever made upon the plaintiff in error therefor. (Transcript, pages 8 and 9).

Point 2:

The assessment of taxes was discriminatory, in that plaintiff in error was subjected to a greater rate of taxation than was assessed upon other moneyed capital.

The plaintiff in error, by special plea filed in the lower court, (Transcript, pages 4-5), alleged in substance that for the year 1903 it had assets of the value of \$107,-

000.00; that taxes were paid by it upon an assessment of \$78,000.00; that if there was any deficiency at all, the deficiency was for \$29,000.00; that still, under the assessment complained of, its property is assessed with an additional amount of \$75,150.00 for the year 1903, being \$46,000.00 in excess of what any individual, firm or corporation would have been required to pay upon the same property, (Transcript, page 4). In other words, the position of the plaintiff in error was that even if it should be liable to the assessment which is complained of in this case, that an assessment against it of \$75,150.00 for the year 1903 was discriminatory, because, under the laws of the State of Mississippi, other moneyed capital similarly situated would not have been subject to taxation for a greater amount than \$29,000.00, for the reason that its capital stock, surplus and undivided profits aggregated \$107,000.00, it paid on an assessment of \$78,000.00, leaving only a deficiency of \$29,000.00. There is no contention in this case that other moneyed capital could have been assessed in any such manner or at any such rate of taxation.

Section 112 of the Constitution of the State of Mississippi is in the following language:

“Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive to other property. Property shall be assessed for taxes under the general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county

shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county."

Section 182 of the Constitution of the State of Mississippi is in the following language:

"The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding five years, the time of such exemptions to commence from date of charter, if to a corporation; and if to an individual enterprise, then from the commencement of work; but when the legislature grants such exemptions for a period of five years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined."

By a long line of decisions in the State of Mississippi it has become well settled that under the foregoing sections of the Constitution of the State of Mississippi, all property shall be assessed uniformly. *People's Warehouse Company v. Yazoo City*, 97 Miss. 500; *Adams v. Kuykendall*, 83 Miss. 571; *Adams v. Bank*, 75 Miss. 701; *C. R. I. & P. Railroad Co. v. Robertson, Revenue Agent*, 122 Miss. 417, 84 South. 449, which is the latest utterance of the

Supreme Court of the State of Mississippi upon the subject.

The plea alleges and the demurrer admits that the plaintiff in error was subjected to a greater liability for taxes than other persons or corporations would have

been under similar circumstances. Therefore, the assessment is condemned by the Act of Congress hereinbefore referred to, as construed by this Court in the case of *First National Bank of Aberdeen v. County of Chehalis*, *supra*; *Owensboro National Bank v. City of Owensboro*, *supra*; *First National Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669; *First National Bank v. Albright*, 208 U. S. 614; *Bank of California v. Richardson*, 248 U. S. 476, 63 L. Ed. 372.

On the suggestion of error in respect to the discrimination complained of, the Supreme Court of the State of Mississippi used the following language, in *First National Bank v. Adams*, *Revenue Agent*, 123 Miss. 280:

“The rule is that a demurrer admits all the facts well pleaded, but does not admit the truth of facts not well pleaded.

“The revenue agent was the complainant and set forth his contentions in a notice of assessment. If any pleading by the defendant was necessary at all, the pleadings would be one of two kinds, either a denial of the plaintiff’s contentions, or, second, by confessing them and pleading in avoidance some affirmative matter which would discharge the obligation admitted in the pleading. The allegations in the present pleadings relied on do not fall in either class. It makes averments, it is true, but the proper plea would have been a denial of the allegations. There was no confession of liability nor of facts from which liability would certainly be inferred with other averments avoiding the legal effect of such confession.”

The rule announced by the Supreme Court of the State of Mississippi was that the plaintiff in error could not avail itself of the discrimination, although the assessment violated the United States statutes, because it was necessary that liability for the tax should first be admitted; that the plaintiff in error could not deny liability

for the tax and at the same time plead that if it should be liable for any assessment, the same was discriminatory. In other words, the Supreme Court of the State of Mississippi held that while the discrimination was conceded, that the same was not properly pleaded. We respectfully submit, with all deference to the Supreme Court of the State of Mississippi, that the legal method of assessment was properly pleaded, and was not waived or lost by anything contained in the plea.

In the case of *Truax v. Corrigan*, decided by this Court January 16th, 1922, Advance Sheets No. 5, L. Ed., the following language was used:

“The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs’ legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court. *Mackay v. Dillon*, 4 How. 431, 11 L. Ed. 1046; *Dower v. Richards*, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court’s declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239, 55 L. Ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427, 432, 63 L. Ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongfully denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongfully denied, may go behind the finding to see whether it is without

substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern R. Co. v. H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604, 32 Sup. Ct. Rep. 389; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277."

Point 3:

Federal Question properly raised.

The defenses of the plaintiff in error arising under the Federal statute referred to were first raised in the circuit court of Harrison County, by plea. They were raised again by amended plea at the time of the third trial. The questions were presented to the Supreme Court of the State of Mississippi by the assignment of error, to which the attention of the court is directed in the petition. Tr. 18.

The Federal questions were not only raised, but on the first appeal after the Federal question was pleaded, the Federal questions were actually decided and passed upon by the Supreme Court in the case of *Adams, Revenue Agent v. First National Bank*, 116 Miss. 450.

Upon the last appeal the previous appeal was reaffirmed. The last appeal is reported in 84 South., page 707, where the Court said:

"The case is controlled by the decision rendered on former appeals thereof, 116 Miss. 450, 77 Southern 195."

A Federal question is always deemed properly raised where the state court proceeds to determine the question. *Meedrich v. Launstein*, 232 U. S. 236, 58 L. Ed. 584; *St. L. I. M. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed.

1031; *North Carolina v. Zaccello*, 232 U. S. 248, 58 L. Ed. 591.

We therefore respectfully submit:

1st. That the assessment complained of in this case is in violation of the statutes of the United States, and therefore void.

2nd. That the assessment was discriminatory.

We respectfully ask that the judgment of the Supreme Court of the State of Mississippi affirming the assessment be reversed and the cause remanded.

Respectfully submitted,

Instructions

Attorneys for plaintiff in error.

FILED
JAN 30 1922
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

No. **136**

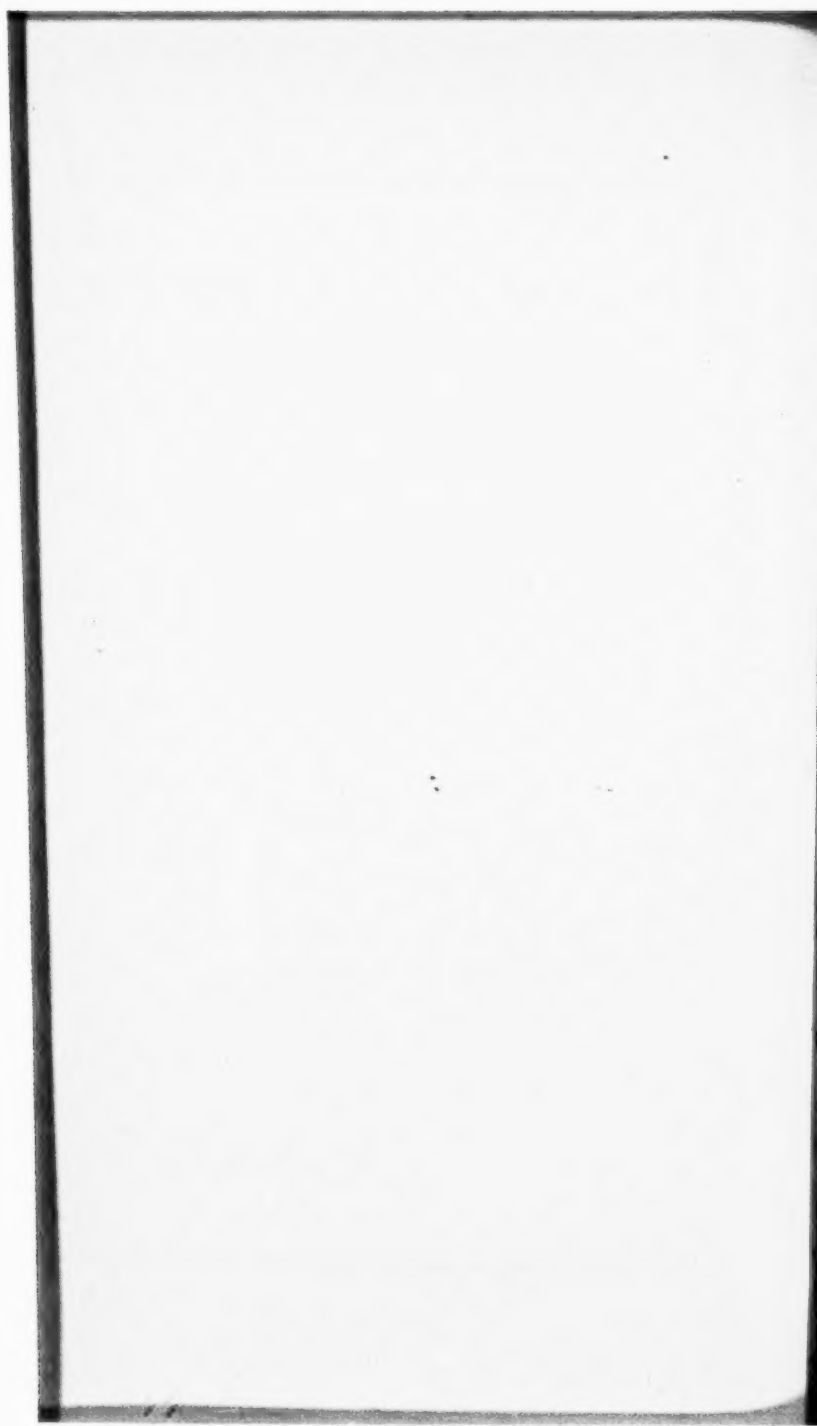
FIRST NATIONAL BANK OF GULFPORT,
PLAINTIFF IN ERROR,

VS.

WIRT ADAMS, REVENUE AGENT OF MISSISSIPPI,
DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Attorney for Defendant in Error.



In the Supreme Court of the United States

No. -----

FIRST NATIONAL BANK OF GULFPORT,
PLAINTIFF IN ERROR,

vs.

WIRT ADAMS, REVENUE AGENT OF MISSISSIPPI,
DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

By virtue of Section 4740 of the Code of Mississippi, of 1906, the Revenue Agent of the State of Mississippi gave notice to the Tax Collector of Harrison County, Mississippi, to make the assess-

ment complained of against the First National Bank of Gulfport, averring that the bank had escaped taxation, which back assessments were accordingly made.

The case went to the Supreme Court of Mississippi three times, the first appeal being reported in

108 *Mississippi*, 346 *et seq.*;

the next in

116 *Mississippi*, 450 *et seq.*;

and, on suggestion of error, appearing in

123 *Mississippi*, 279.

The taxes that the Revenue Agent averred had escaped were those imposed by Section 4273 of the Code of Mississippi of 1906; and the contention of the Revenue Agent is that this is not a direct tax on the national bank, but is a tax on the shareholders, which should be paid by the bank, and that, as a matter of fact, the statute imposes the tax, not on the bank or its capital stock, but upon its shareholders, and that the bank is required to pay same.

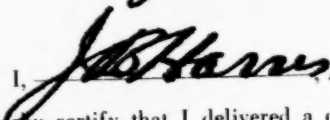
Appellee relies upon the following cases for authority:

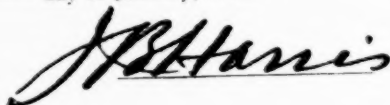
Owensboro National Bank vs. Owensboro, 173 U. S., 664; Aberdeen First National Bank vs. Chehallis Co., 166 U. S., 440; First National Bank of Jackson vs. McNeel, Rev. Coll'r., 151 Circuit Court of Appeals, 495; Home Savings Bank vs. Des Moines, 205 U. S., 503; Bank vs. Oxford, 70 Mississippi, 504; Vicksburg Bank vs. Worrell, 67 Mississippi, 47; Maguire vs. Board of Revenue, 71 Alabama, 401; First National Bank vs. Durr, 246 Fed., 163; Bank of California vs. Richardson, 63 Law Edition, U. S. Supreme Court, Rep., 372.

It is, therefore, respectfully submitted that the opinion of the Supreme Court of the State of Mississippi should be by this honorable court affirmed.

Respectfully submitted,


COUNSEL FOR DEFENDANT IN ERROR.

I,  Attorney for Defendant in Error, hereby certify that I delivered a copy of the foregoing brief for defendant in error to counsel for plaintiff in error, at Jackson, Mississippi, on this the 26 day of January, 1922.



FIRST NATIONAL BANK OF GULFPORT, MISSISSIPPI, *v.* ADAMS, REVENUE AGENT OF THE STATE OF MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 136. Argued March 2, 1922.—Decided April 10, 1922.

1. A state tax upon a national bank, based on its capital stock, surplus, undivided profits and other property, is not equivalent to a tax upon the shareholders in respect of their shares and is invalid under Rev. Stats., § 5219. P. 364.
2. When the validity of an assessment by state officers is challenged here, the court must determine the effect of the thing actually done; what might have been done under the local statute is not controlling. P. 365.

123 Miss. 279; 84 So. 707, reversed.

362.

Opinion of the Court.

CERTIORARI to a judgment sustaining a tax on the petitioner.

Mr. Wm. H. Watkins for petitioner.

Mr. J. B. Harris, for respondent, submitted.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Petitioner is a national bank located at Gulfport, Harrison County, Mississippi. The State Revenue Agent instructed the Tax Collector for that County as follows:

"The following described property, in said County, to-wit: Capital Stock, surplus, undivided profits, and any and all other property properly assessable to banks, amounting to \$75,150, belonging to and owned by First National Bank of Gulfport has escaped taxation during each of the years 1902, 1903, 1904, 1905, 1906 and 1907, by reason of not being assessed.

"You are by virtue of the Annotated Code of Mississippi of 1906, Chapter 131, Sec. 4740, now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment, on the roll or tax list in your hands, and to give ten days' notice in writing to said First National Bank whose property is so assessed, and also notify in writing the Board of Supervisors of said County, of said assessment."

In obedience to this instruction, the Collector entered upon the rolls of his office an assessment to the Bank in these words—"Amount of all other personal property not otherwise mentioned, \$174,000.00."

Objection was duly offered upon the ground that the corporation was assessed and not the stockholders as required by § 5219, Revised Statutes of the United States. The Harrison County Circuit Court overruled this and directed the Board of Supervisors:

"To assess the First National Bank of Gulfport, Mississippi, with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of \$75,150.00, for the years 1903, 1906 and 1907, which said property was at said time owned by said First National Bank and which had escaped taxation for each of the years as hereinbefore set out; and said Board of Supervisors is hereby directed to make such assessment by way of additional assessment on the roll and tax list of Harrison County, Mississippi."

The Supreme Court of the State approved this judgment. See *State Revenue Agent v. Bank*, 108 Miss. 346; *Adams v. First National Bank of Gulfport*, 116 Miss. 450; *First National Bank of Gulfport v. Adams*, 123 Miss. 279.

Section 5219¹ Revised Statutes, (copied below) prescribes the full measure of the power of the several States to impose taxes upon national banking associations or their stockholders. Any assessment not in conformity therewith is unauthorized and invalid. *Bank of California v. Richardson*, 248 U. S. 476, 483. "The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the

¹ Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

debt and in behalf of the shareholder, leaving to the corporations the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him." *Home Savings Bank v. Des Moines*, 205 U. S. 503, 518. But as pointed out in *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 676, 677, a tax levied upon a corporation measured by the value of its shares is not equivalent to one upon the shareholders in respect of their shares.

Where the validity of an assessment by officers of the State is properly challenged, and the matter comes here, this court must determine the effect of the thing actually done. What might have been done under the local statute is not controlling. We think it clear that the assessment in the present case was against the corporation and beyond the power of the State definitely delimited by § 5219.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARKE took no part in the consideration or decision of this cause.
